(1)

No. _____

Supreme Court, U.S.
FILED
04-865 DEC 20 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

CHAPLAINCY OF FULL GOSPEL CHURCHES, ET AL., AND ROBERT H. ADAIR, ET AL.,

Petitioners,

v.

GORDON R. ENGLAND, SECRETARY OF THE NAVY, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
Post Office Box 7482
Charlottesville, Virginia 22906
(434) 978-3888
Of Counsel

Arthur A. Schulcz, Sr.
Affilliated Attorney with
The Rutherford Institute
2521 Drexel Street
Vienna, Virginia 22180
(703) 645-4010
Counsel of Record

Date: December 20, 2004

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTIONS PRESENTED FOR REVIEW

I. Whether Congress intended 10 U.S.C. § 618(f) to bar discovery into constitutional and statutory violations in military promotion board proceedings.

II. Whether Congress may bar discovery into constitutional violations of the Navy's promotion procedures and thereby extinguish chaplains' claims of constitutional violations.

III. Whether strict scrutiny applies when the Sovereign's authority to grant or deny government benefits to faith group representatives is delegated to other faith group representatives on loan from their faith community (i.e., chaplains) and there are no guarantees that the Sovereign's authority will be used for neutral, secular and non-ideological purposes.

PARTIES TO THE PROCEEDINGS

The Petitioners, who were Plaintiffs-Appellees in the Court of Appeals, are The Chaplaincy of Full Gospel Churches, Martha Carson, Mark Johnston, Klon K. Kitchen, Jr., Denise Merrit, Duane Purser, Dan Roysden, Mary Helen Spalding, Barby Wilson, Robert Adair, Michael Belt, Gregory De Marco, Furniss Harkness, Michael Lavelle, George Linzey, Timothy Nall, Thomas Rush, James Weibling, Michael Wright, Richard Hamme (formerly John Witherspoon, a pseudonym), William Blair, Larry Farrell, Raphael Quiles, Lyle Swanson, Ronald Tomlin, and David Wilder. The individual Petitioners are current, former or retired Navy chaplains whom the Navy categorizes as "non-liturgical." *See* Glossary.

The Respondents, who were Defendants-Appellants in the Court of Appeals, are the United States Navy and the following persons in their official capacity: Gordon England, Secretary of the Navy (the "Secretary"); Vice Admiral Gerald L. Howeing, Chief of Naval Personnel; Rear Admiral Louis V. Iasiello, Chief of Chaplains, and Rear Admiral Robert F. Burt, Deputy Chief of Chaplains.

CORPORATE DISCLOSURE STATEMENT

The Chaplaincy of Full Gospel Churches (hereafter "CFGC") is an agency established to endorse chaplains from Christian Charismatic, non-denominational churches, fellowships, and associations. CFGC is a 28 U.S.C. § 501(c)(3) organization and a subdivision of Ammerman Trinity Ministries, Inc., a corporation organized and registered under Texas law. Neither Ammerman Trinity Ministries, Inc. nor CFGC is a corporation whose stock is publicly traded.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES CITED v

CITATIONS OF ORDERS AND OPINIONS 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS .. 1

STATEMENT OF THE CASE 2

REASONS FOR ALLOWING THE WRIT 6

I. *IN RE ENGLAND* CONFLICTS WITH THIS COURT'S PRECEDENTS 7

II. *IN RE ENGLAND* CONFLICTS WITH OTHER COURTS OF APPEALS 19

III. *IN RE ENGLAND'S* HOLDING IGNORES THE RULES OF STATUTORY CONSTRUCTION 20

IV. *IN RE ENGLAND'S* HOLDING UNDERMINES IMPORTANT NATIONAL POLICIES 21

V. SUPREME COURT DIRECTION AND GUIDANCE ON STRICT SCRUTINY IS NEEDED 23

CONCLUSION 26

APPENDIX

Decision of the United States Court of Appeals in *In re England* A-1

Order of the United States Court of Appeals Denial of Petition for *En Banc* Review A-24

Order of the Court of Appeals amending its order denying the Petitioners' Petition for Rehearing *En Banc* A-25

Opinion and judgment of the District Court for the District of Columbia granting the Petitioners' motion to compel discovery, *Chaplaincy of the Full Gospel Churches v. Johnson*, 217 F.R.D. 250 (D.D.C. 2003) A-26

Opinion of the District Court for the District of Columbia denying in part and granting in part Respondents' motion to dismiss, *Adair v. England*, 183 F. Supp. 2d 31 (D.D.C. 2002) A-47

10 U.S.C. § 618 Action on reports of selection boards . A-109

EXHIBITS IN SUPPORT OF MOTION TO COMPEL

Declaration of Gary Paul Stewart A-113

Declaration of Klon K. Kitchen, Jr. A-115

Affidavit of Floyd Cedric Ellison A-117

Declaration of Gary Paul Stewart (Supplemental) A-120

June 13, 2001, Southern Baptist Convention Resolution No. 7 on Discrimination Against Military Chaplains . A-122

8 AUGUST 2001 Associated Gospel Churches Resolution Regarding Alleged Religious Discrimination Against Military Chaplains Serving in the U.S. Navy A-125

Glossary A-127

TABLE OF AUTHORITIES CITED

FEDERAL CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 16, 20

Adair v. England, 183 F. Supp. 2d 31 (D.D.C. 2002) .. 1, 23, 25

Adair v. England, 209 F.R.D. 5 (D.D.C. 2002) 2

Adair v. England, 217 F.Supp.2d 7 (D.D.C. 2002) 5, 7

Adair v. England, 217 F.R.D.250 (D.D.C. 2003) 18

Aderand Constructors Inc. v. Pena, 515 U.S. 200 (1995) 5

Baldridge v. Shapiro, 455 U.S. 345 (1982) 19

Barlow v. Collins, 397 U.S. 159 (1970) 9, 21

Bd. of Education of Kiryas Joel v. Grummet,
512 U.S. 657 (1994) 24

BE & K Construction Co. v. N.L.R.B., 536 U.S. 576 (2002) .. 17

California Motor Transport Co. v. Trucking Unlimited,
404 U.S. 508 (1972) 17

Cannon v. University of Chicago, 441 U.S. 677 (1979) 21

Chaplaincy of the Full Gospel Churches v. Johnson,
276 F.Supp.2d 82 (D.D.C. 2003) 1

Chaplaincy of the Full Gospel Churches v. Johnson,
217 F.R.D. 250 (D.D.C. 2003) 26

Christian v. United States, 337 F.3d 1338 (Fed. Cir.),
cert denied, 124 S.Ct. 1576 (2004) 10

City of Boerne v. Flores, 521 U.S. 507 (1977) 19

City of Littleton, Colo. v. Z. J. Gifts D-4, LLC, __ U.S. __, 124 S.Ct. 2219 (2004) 24

Clay v. United States, 537 U.S. 522 (2003) 8, 21

Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632 (1974) 25

Colautti v. Franklin, 439 U.S. 379 (1979) 8

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) 23, 24

Conley v. Gibson, 355 U.S. 41 (1957) 25

County of Allegheny v. ACLU, 492 U.S. 593 (1989) 23

Department of Air Force v. Roe, 425 U.S. 352 (1975) 22

Elkins v. United States, 364 U.S. 206 (1960) 14

Emory v. Secretary of Navy, 819 F.2d 291 (D.C. Cir. 1987) .. 10

Fluellen v. United States, 225 F.3d 1298 (Fed. Cir. 2000) ... 10

Freeman v. Seligson, 405 F.2d 1326 (D.C. Cir. 1968) 20

Hickman v. Taylor, 329 U.S. 495 (1946) 14

Hudson v. Palmer, 468 U.S. 517 (1984) 17

In re England, 375 F.3d 1169 (D.C. Cir. 2004) 1

In re Nelson, 873 F.2d 1396 (11th Cir. 1989) 19

Jaffe v. Redmond, 518 U.S. 1 (1996) 15

Jicarilla Apache Nation v. United States, 60 Fed.Ct. 611 (2004) 19

Johnson v. Robison, 415 U.S. 361(1974) 19

Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985) 2

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) 22, 25

Larsen v. Valente, 456 U.S. 228 (1982) 5, 22

Lemon v. Kurtzman, 403 U.S. 602 (1971) 25

Lucas v. Forty-fourth General Assembly of Colorado, 377 U.S. 713 (1964) 18

Nyeholt v. Secretary of Veterans Affairs, 298 F.3d 1350 (Fed. Cir. 2002) 19

Perrin v. United States, 444 U.S. 37 (1979) 9

Pierce County, Wash. v. Guillen, 537 U.S. 129 (2003) 15

Porter v. United States, 163 F.3d 1304 (Fed. Cir 1998), *cert. denied*, 528 U.S. 809 (1999) 8

School Board of Abington Township v. Schempp, 374 U.S. 203 (1963) 26

St. Regis Paper Co. v. United States, 368 U.S. 208 (1961) 9, 13, 16

Stanley v. Illinois, 405 U.S. 645 (1972) 25

Steffel v. Thompson, 415 U.S. 452 (1974) 21, 22

Trammel v. United States, 445 U.S. 40 (1980) 14

U.S. v. Ron Par Enterprises, 489 U.S. 235 (1989) 7

United States v. Bryan, 339 U.S. 323 (1950) 13

United States v. Nixon, 418 U.S. 683 (1974) 14

United States v. Proctor and Gamble Co.,
356 U.S. 677 (1958) 14

United States v. Reynolds, 345 U.S. 1 (1982) 13, 14

United States v. U.S. District Court for So. Dist. of Cal.,
384 F.3d 1202 (9th Cir. 2004) 7, 19

University of Pa. v. E.E.O.C., 493 U.S. 182 (1990) 14, 15

Washington v. Davis, 426 U.S. 219 (1976) 7, 17

Webster v. Doe, 486 U.S. 592 (1988) 16

Wilkins v. U.S.A., 99cv1579 19

Zambrano v. INS, 972 F.2d 1122 (9th Cir. 1992),
rev'd on other grounds, Reno v. Catholic Social Services,
509 U.S. 43 (1993) 19

FEDERAL STATUTES

5 U.S.C. § 702 2

10 U.S.C. § 101(f) 7, 8, 20

10 U.S.C. § 612 23

10 U.S.C. § 616 17

10 U.S.C. § 618 1

10 U.S.C. § 618(f) ..... passim

10 U.S.C. § 14509 26

10 U.S.C. § 14703(a) 26

23 U.S.C. § 152 15

23 U.S.C. § 409 16

28 U.S.C. § 1254 1

28 U.S.C. § 1331 2

28 U.S.C. §1343 2

28 U.S.C. § 1346 2

42 U.S.C. §§ 2000-bb 3

45 U.S.C. § 41 13

49 U.S.C. § 320(f) 13

OTHER AUTHORITIES

Defense Officer Personnel Management Act of 1980 8

Federal Hazard Elimination Program, 23 U.S.C. § 152 ... 15

Federal Rule of Evidence 501 14

Religious Freedom Restoration Act,
42 U.S.C. §§ 2000-bb, *et seq.* 3

Secretary of Navy Instruction 1401.3, encl., ¶ 1.C.1. ... 3, 23

1980 U.S. Code and Cong. Admin. News 6333, 6337-39. 8, 9

Senate Report 102- 482 22

The Senate Armed Services Committee's 1992 "Report
on the Conduct of Proceedings for the Selection of
Officers for Promotion in the U. S. Air Force." 10

CITATIONS OF ORDERS AND OPINIONS

The opinion and judgment of the United States Court of Appeals for the District of Columbia is reported as *In re England*, 375 F.3d 1169 (D.C. Cir. 2004) and is set forth in the Appendix beginning at A-1. The orders of the Court of Appeals for the District of Columbia denying the Petitioners' Petition for Rehearing En Banc and amending that order are not reported and are set forth in the Appendix at A-26and A-27, respectively.

The opinion and judgment of the District Court for the District of Columbia granting the Petitioners' motion to compel discovery is reported as *Chaplaincy of the Full Gospel Churches v. Johnson*, 217 F.R.D. 250 (D.D.C. 2003) and is set forth in the Appendix beginning at A-28. The opinion of the District Court for the District of Columbia denying in part and granting in part Respondents' motion to dismiss is reported as *Adair v. England*, 183 F. Supp. 2d 31 (D.D.C. 2002) and is set forth in the Appendix beginning at A-51.

STATEMENT OF JURISDICTION

The judgment for which review is sought was entered by the Court of Appeals for the District of Columbia on July 27, 2004. The Petitioners timely filed a Petition for Rehearing En Banc in the Court of Appeals on September 7, 2004. The Court of Appeals denied rehearing in a *per curiam* order entered September 21, 2004. By an order entered October 4, 2004, the Court of Appeals amended the September 21, 2004 order to make that order applicable to both cases. This Court has jurisdiction over this Petition pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the construction of 10 U.S.C. § 618, "Action on Reports of Selection Boards," which is set forth in

the Appendix beginning at A-121. Section 618(f), at issue here, provides "[e]xcept as authorized or required by this section, proceedings of a selection board convened under § 611(a) of this title may not be disclosed to any person not a member of the board."

STATEMENT OF THE CASE

This case involves consolidated actions filed in the District Court for the District of Columbia. One action was brought by CFGC, a non-liturgical Christian chaplain endorsing agency, and eight of its Navy chaplains. The other action was brought by 17 other non-liturgical chaplains on behalf of themselves and a class of Navy non-liturgical chaplains. *See Adair v. England*, 209 F.R.D. 5 (D.D.C. 2002) (approving class certification). The District Court consolidated the cases for the purpose of pretrial motions. The District Court had jurisdiction over these actions under 28 U.S.C. §§ 1331, 1343 and 1346, and 5 U.S.C. § 702.

Petitioners' complaints alleged that the Navy Chaplain Corps has discriminated against them and the class in promotions, accessions, and career opportunities by favoring Catholic and liturgical Protestant chaplains in violation of the First and Fifth Amendments[1] and the Religious Freedom

---

[1] Petitioners argue the only time that Respondents may consider denomination is in chaplain accessions so the Chaplain Corps meets the Navy's Free Exercise needs. *Katcoff v. Marsh*, 755 F.2d 223, 234 (2d Cir. 1985). Constitutional justification for military chaplains is "not to deprive the soldier of his right under the Establishment Clause not to have his religion inhibited [due to military circumstances] and of his right under the Free Exercise Clause to practice his freely chosen religion." *Id.* at 231. The right of Free Exercise is personal to the individual, *id.* at 228, 232, 234 (explaining soldier's right to practice his freely chosen religion) *id.* at 225-26 (Army established chaplain quotas based on religious demographics). Since promotion is based on ability to supervise and other neutral, secular military criteria, denomination is a forbidden promotion factor. *Compare id.* at 226 (Army chaplain's promotion based on military performance and not on his effectiveness as a cleric).

Restoration Act ("RFRA"), 42 U.S.C. §§ 2000-bb, *et seq.* CFGC began endorsing chaplains in the Navy and Army in 1984 and in the Air Force in 1990. While its Army and Air Force chaplains have done well in those services, when CFGC filed its Complaint, none of its 32 Navy chaplains had been promoted to Commander and only seven to Lieutenant Commander.

Under 10 U.S.C. § 612, promotion boards must have at least five officers, one of whom is in the category under consideration. Secretary of Navy Instruction ("SECNAVINST") 1401.3, encl., ¶ 1.C.1. requires the board be composed of chaplains and one line officer. A Naval Inspector General ("NIG")'s investigation into the FY 2000 Chaplain Captain promotion board described the voting procedure. Each member, in secret, votes a confidence level for selection from 0 to 100, in increments of 25. Since a combined score of 100 is needed for selection, a single vote of "0" ensures that the candidate will not be selected.[2]

Petitioners challenge the Navy's chaplain promotion practice and policies of: (1) always having a Catholic selection board member (*i.e.*, a Catholic reserved seat), (2) the identification of each chaplain's faith group to the board members, (3) the use of faith group as a factor in determining who is retained or promoted rather than the chaplain's military record, (4) the influence of the Chief of Chaplains or his Deputy in approving chaplain board members and as President of the selection boards, (5) stacking promotion boards with chaplains from the liturgical tradition (Catholic and liturgical Protestant), and (6) the delegation of the Sovereign's power to "denominational representatives" (*i.e.*,

---

[2] The NIG concluded that a female Chaplain board member had illegally "zeroed out" a female chaplain candidate because the board member disagreed with the candidate's view of women in the military.

chaplains) in awarding, withholding and terminating government benefits (*i.e.*, Navy promotions and careers).

Pages 3 and 4 of the Department of Defense Inspector General ("DODIG") investigation into the FY 97 and 98 Chaplain Commander promotion boards (the DODIG) were the *Adair* Complaint's Exhibit 6. The DODIG found that denominational consideration "may have been a factor in the final selection made by the FY 97 board (after several votes, a Roman Catholic was picked over a Baptist)," DODIG at 3, and "we found some evidence that denominational considerations may have been a factor in selections made by the FY 98 board." *Id.* at 4. Opposing Respondents' motion to dismiss, Petitioners provided as exhibits the NIG and DODIG investigations into the FY 97 and 98 Chaplain Commander promotion boards and their interviews. The exhibits clearly showed denomination had influenced the selection of chaplains on the FY 97 and 98 boards, supporting Petitioners' assertion. For example, in Exhibit 7, Rear Admiral Holderby, President of the FY 97 board, admitted to the NIG that the board selected a priest with a poor record, rather than "another chaplain with a perfect record," because of denominational considerations after a priest board member's' "impassioned plea."

Denying Petitioners' request to treat their Opposition as a summary judgment motion and consider the exhibits, A-102, the District Court dismissed Petitioners' claim that allowing chaplains to exercise the sovereign's power on promotion boards or allowing chaplains to rate other chaplains raised First Amendment concerns. Rather than evaluate the implications of Exhibit 6 and the proffered evidence, the District Court applied the *presumption* of regularity to chaplains as board members, A-104, and held "the plaintiffs' assertion that chaplains will necessarily discriminate against other chaplains on the basis of religion is an unsupported allegation that is not sufficient to state a claim for a First Amendment violation." A-105. It went on to hold

that because "Navy chaplains are first and foremost Naval officers ... when they sit on promotion boards, they act as officers," not as denominational representatives." A-107, 108

Petitioners subsequently argued in partial summary judgment (PSJ) that the Navy's practice of identifying each chaplain's faith group to the board members was subject to strict scrutiny under *Aderand Constructors Inc. v. Pena*, 515 U.S. 200, 227-28 (1995) (use of forbidden classifications analyzed under strict scrutiny). The District Court denied Petitioners' PSJ, holding that under *Larsen v. Valente*, 456 U.S. 228, 246-47 (1982) strict scrutiny applied only after Petitioners showed favoritism in board proceedings. *Adair*, 217 F.Supp.2d 7, 12-15 (D.D.C. 2002) (denying PSJ). "*[I]f the plaintiffs can demonstrate after discovery* that some or all of the Navy's policies and practices suggest a denominational preference, then the court will apply strict scrutiny to those policies and practices for which plaintiffs have met this initial burden." *Id.* at 14-15 (emphasis added).

To pursue evidence of religious prejudice and favoritism in board proceedings and document the impact of identifying each chaplain's denomination to the chaplain board members, as required by the District Court's Order, Petitioners asked the Secretary of Navy to release chaplain board personnel from the oath of secrecy he requires of all selection board personnel. This oath is enforced by the Uniform Code of Military Justice. The Secretary refused, relying upon the provisions of 10 U.S.C. § 618(f). Petitioners filed a motion to compel, supported with declarations from 1) board personnel stating they had relevant evidence of promotion board misconduct, (*e.g.*, A-125-26), and 2) chaplains who had been told of religious prejudice by board members.[3]

---

[3]Two 1996 Captain Chaplain selection board members described to other chaplains how the board (1) reconvened after it had adjourned in response to the Catholic board member's complaint that no Catholic had been selected and (2) deselected a Protestant to select the Catholic suggested by the Catholic board member. A-127-131.

Other evidence of promotion board misconduct came from the DODIG and NIG. The District Court granted the motion, relying on D.C. Circuit precedents. A-35-48. "It is hard to argue that the testimony of former selection board personnel with direct knowledge of board proceedings is not 'relevant' and 'reasonably calculated to lead to the discovery of admissible evidence' regarding alleged Navy discrimination against non-liturgical chaplains in those very proceedings." A-37. The District Court concluded that Petitioners "have provided an adequate factual basis for their belief that the requested testimony will provide evidence of government misconduct." A-41. To protect the Respondents' interests in frank and candid discussions, the District Court directed the parties to "jointly provide" a discovery plan. A-49. Respondents appealed under the collateral order exception and filed a petition for mandamus. *Id.* at A-10.

The Court of Appeals (a) reversed, holding that the phrase "may not disclose" in 10 U.S.C. § 618(f) was the language of command barring discovery of board proceedings, A-22, and, (b) although recognizing that a chaplain was "a professional representative of a particular denomination," A-4, denied Petitioners' request to review under collateral appellate jurisdiction the District Court's finding that (1) chaplain board members served as officers, not denominational representatives, and (2) no First Amendment concerns arose from delegating the Sovereign's power to these particular "denominational representatives" acting as chaplain selection board members. *Id.* at A-2. Petitioners' request for rehearing en banc of the panel's decision was denied on September 21, 2004. A-26.

REASONS FOR ALLOWING THE WRIT

As shown below, the D.C. Circuit decided an important question of federal law that is in conflict with the relevant decisions of this Court, undermines important federal policies, and raises constitutional issues. The challenged

decision is also in conflict with decisions of the Courts of Appeals for the Ninth, Eleventh, and Federal Circuits on the same or similar issue. In fact, *In re England* conflicts with a decision on the very same issue rendered in the U.S. District Court for the Southern District of California allowing an involuntarily retired chaplain alleging religious discrimination to depose personnel who sat on the chaplain's selection board, notwithstanding the provisions of 10 U.S.C. § 618(f)). The Ninth Circuit denied the Respondents' interlocutory appeal and petition for a writ of mandamus to review the district court's order. *United States v. U.S. District Court for So. Dist. of Cal.*, 384 F.3d 1202 (9th Cir. 2004). *In re England's* departure from the accepted course of judicial proceedings and relevant decisions of this Court warrant an exercise of this Court's supervisory power.

I. *IN RE ENGLAND* CONFLICTS WITH THIS COURT'S PRECEDENTS

In holding that 10 U.S.C. § 618(f) barred discovery from promotion board personnel, the Court of Appeals effectively barred Petitioners' Fifth Amendment claims, *see Washington v. Davis*, 426 U.S. 219, 239-40 (1976) (plaintiff must show invidious discrimination to establish a governmental Due Process violation), First Amendment claims, *see Adair*, 217 F.Supp.2d at 14-15 (chaplains must show illegal preference in board proceedings), and RFRA. This decision clearly conflicts with this Court's precedents.

A. A Statute Must Be Interpreted to Give Effect to All Its Provisions

The Court of Appeals' interpretation of 10 U.S.C. § 618(f) is contrary to 10 U.S.C. § 101(f)'s "Rules of Construction." This violates the rule that courts are to interpret statutes in a manner that gives effect to every provision, the intent of Congress, and does not lead to absurd results. *U.S. v. Ron Par Enterprises*, 489 U.S. 235, 242 (1989).

The statute at issue here, 10 U.S.C. § 618(f), was part of the Defense Officer Personnel Management Act of 1980 (DOPMA). It was the result of six years of congressional efforts to reform the military officer personnel management system and make officer promotions more fair and equitable. 1980 U.S. Code and Cong. Admin. News (USCCAN) 6333, 6337-39. DOPMA's major components were thoroughly covered and explained in its legislative history. *Porter v. United States*, 163 F.3d 1304, 1313 (Fed. Cir. 1998), *cert denied*, 528 U.S. 809 (1999).

The Court of Appeals' finding that § 618(f)'s "may not be disclosed" is the language of command, A-15, is inconsistent with 10 U.S.C. § 101(f)'s contrary command which states in pertinent part:

> (f) Rules of construction.– In this title –
> (1) "shall" is used in an imperative sense;
> (2) "may" is used in a permissive sense;
> (3) "no person may * * *" means that no person is required, authorized, or permitted to do the act proscribed[.]

Congress not only defined the interpretation of "may" in § 618(f), but also provided other specific language in § 101(f)(3) to signify when it intended an absolute prohibition on disclosure. "As a rule, 'a definition which declares what a term means ... excludes any meaning that is not stated.'" *Colautti v. Franklin*, 439 U.S. 379, 392 n.8 (1979) (citations omitted).

Had Congress intended § 618(f) to be an absolute bar to any type of disclosure, it would have used prohibitive language. An absolute bar in § 618(f) consistent with § 101(f)(3) would read "no person may disclose the proceedings of a selection board ...", but that is not the language Congress put in § 618(f). The omission is presumed to be intentional and purposeful. *Clay v. United States*, 537 U.S. 522, 528 (2003).

Since Congress did not use § 101(f)(3)'s mandatory prohibition language, the words it did choose, "may not be disclosed," must be interpreted in § 101(f)(2)'s "permissive sense" and in the context of a narrow interpretation to preclude the suppression of competent evidence as required by *St. Regis Paper Co. v. United States*, 368 U.S. 208, 218 (1961). This means that disclosure is presumed, but the Secretary has authority not to disclose it. This interpretation (1) is consistent with "the presumption that judicial review of executive decisions is the rule, and nonreviewability an exception which must be demonstrated," *Barlow v. Collins*, 397 U.S. 159, 166 (1970); (2) is consistent with Congress' well-established oversight role in investigating and correcting misconduct or bias in promotion board proceedings, *see* B below; (3) shows Congress' intent that board misconduct be exposed and corrected as required by the Constitution and Federal Court precedent at the time DOPMA was passed, and; (4) avoids constitutional questions.

The Court of Appeals does not have authority to change Congress' choice of words or their meaning. Shielding prejudice from judicial review also conflicts with and undermines DOPMA's objectives. 1980 USCCAN at 6337-39. Denying constitutional claims and restricting the right to seek redress are other absurd results. *See* B-D below.

In re England's holding is also absurd because it construed the word "proceedings" in a very narrow sense to mean only "deliberations," the specific issue before it. A-22. However, in § 618(f) Congress used "proceedings", which has a much broader context and includes all of the processes, beginning with the decision to hold a selection board and ending with the release of the board results. *In re England's* narrow interpretation conflicts with the rule that words not specifically defined must be given their common usage. *Perrin v. United States*, 444 U.S. 37, 42 (1979). The D.C. and Federal Circuits and the Court of Federal Claims would seem to have violated § 618(f) by their consistent responses to officers' challenges to various previous selection board proceedings.

For example, an African-American Naval Reservist alleged the proceedings of a Rear Admiral selection board denied him fair consideration in *Emory v. Secretary of Navy*, 819 F.2d 291 (D.C. Cir. 1987). "The Court of Federal Claims held that the *proceedings* by which an Army board recommended the involuntary retirement of certain Army officers were constitutionally invalid because of instructions by the Secretary of the Army that the Board give minority and female officers preferential treatment." *Christian v. United States*, 337 F.3d 1338, 1339 (Fed. Cir.), *cert denied*, 124 S.Ct. 1576 (2004) (emphasis added). *Fluellen v. United States*, 225 F.3d 1298, 1300-01 (Fed. Cir. 2000), rejected an Air Force officer's challenge to the use of panels to determine promotions. Nothing in DOPMA suggests a narrow reading of the word "proceedings."

B. *In re England* Would Bar Congress' Oversight Investigations Into Promotion Board Misconduct

In re England's conclusion that § 618(f) "categorically bars mere disclosure to anyone not a member of the promotion selection boards," A-21, rested on its finding that Congress' words in § 618(f) provide no exception to a bar on disclosure. *Id.* at A-15. This "no exception" holding also precludes *Congress* from reviewing or investigating selection board proceedings. This is not only absurd but raises a constitutional question, *see* F *infra*, due to the separation of powers. Would Congress abdicate its constitutional responsibility to oversee and investigate the officer promotion and selection proceedings without any explanation or justification in DOPMA? Congress certainly has not understood that it had abdicated its oversight responsibilities.

Senate Report 102– 482 (the "Report") sets forth the Senate Armed Services Committee (SASC)'s 1992 "Report on the Conduct of Proceedings for the Selection of Officers for Promotion in the U. S. Air Force." It publicly reports on the SASC's investigation into misconduct in officer selection

board proceedings, "serious and systematic deficiencies in the procedures used by the Air Force to recommend officers to general officer positions." *Id.* at 1. The Report contradicts *In re England* in numerous ways. First, Congress asked for information directly related to selection board deliberations, and the Air Force and DOD responded. *Id.* at 1-2. If § 618(f) were an *absolute bar* to disclosure, DOD and the Air Force could have refused to provide such information to Congress and Congress would have been unable to obtain information required for its constitutional oversight function. The Report would have mentioned the services' waiver of § 618(f) if it were a bar.

Second, the Report emphasized that the "fair and impartial conduct of the selection process is a matter of great concern to the Committee. The integrity of the selection process is essential to the integrity of the officer corps." *Id.* at 1. In the context of the Report, this is in stark contrast to Secretary England's declaration concerning the importance of hiding misconduct from discovery, A-12, 17, showing the Respondents' position is without foundation and contrary to the public interest. If Congress were concerned enough about "the integrity of the selection process" to bring board misconduct and board discussions into the public view, it follows that courts should also be concerned when allegations of unconstitutional misconduct are surfaced. The courts' role as guardians of the Constitution parallels Congress' oversight role.

Third, the Report also described the Senate's earlier investigation of impropriety in a Marine Corps selection board that "involved verbal communications by the Secretary of the Navy and the Commandant ... to the President of the selection board" similar to the Air Force problem. *Id.* at. 3. The Report expressed Congress' concern in the "fairness of the selection process" and in protecting board members from outside influences during the selection process, *id*, another example of Congress' practice and belief that exposure of selection board

misconduct was an important public policy and interest.

Fourth, General McPeak testified about selection board *proceedings*, identifying deficiencies in the system including "[i]mproper briefings of the Secretary and the Chief of Staff ["CoS"] of the preliminary decisions of selection boards prior to final action by the board." *Id.* at 6; *compare with* § 618(f). According to the *In re England* absolute bar theory, the General violated § 618(f) since he revealed and discussed selection board proceedings and deliberations. The Report identified obvious § 618(f) violations: board results were routinely discussed with the Secretary and non-board member CoS before the board report was signed, *id.* at 12, and a board President and the CoS discussed a Brigadier General under consideration for selection. *Id.* at 12-13. The Report: (1) emphasized the Air Force's failure "to conduct its selection board proceedings as required by law, in a manner that insulated board members from any communication that could be viewed by board members as influencing them toward a particular selection," *id.* at 13; (2) specifically identified as a potential § 618(f) violation the board access afforded the non-board member Deputy CoS for Personnel and board members questioning him about officers under consideration, *id.* at 13-14; and (3) also identified improper communications by board members with outside sources concerning comments in records before the board. *Id.* at 15.

The Report also reveals the absurdity of *In re England*'s holding in the context of the Separation of Powers. Under the Court of Appeals' "absolute bar" theory, all military services would be able to deny, hide or conceal from Congress the information necessary for Congress to properly exercise its constitutional oversight responsibilities. The DODIG investigation into the FY 97 and 98 Chaplain Commander boards acknowledges on page 7 that it was initiated by Congressmen. Respondents must argue that Congress is an exception to § 618(f) but the Judiciary is not. The Constitution assigns courts a fact-finding responsibility. For the same

reason that the military cannot deny Congress the information necessary for its oversight, Respondents may not deny the Court its proper role in controlling the evidence and addressing alleged violations of the Constitution. *United States v. Reynolds*, 345 U.S. 1, 9-10 (1982) ("judicial control over the evidence cannot be abdicated to the caprice of executive officers").

C. Statutes Prohibiting Disclosure Do Not Bar Discovery Absent Specific Language Showing Congress' Clear Intent

Addressing a claim for a statutory discovery privilege, this Court has held that "[o]urs is a duty to avoid a construction that would otherwise suppress competent evidence unless the statute, strictly construed, requires such a result." *St. Regis Paper*, 368 U.S. at 218. "Indeed, when Congress has intended like reports not to be subject to compulsory process it has said so." *Id.* Section 618(f) does not have the specific language showing Congress' intent to bar discovery, such as "no report may be used as evidence or ... for any purpose in any suit or action for damages [arising from the report]" found in 45 U.S.C. § 41 and 49 U.S.C. § 320(f), which *St. Regis Paper* cited as.

This Court has emphasized the fundamental nature of the right to be able to develop evidence to vindicate individual rights in the American adversarial system:

> Testimonial exclusionary rules and privileges contravene the fundamental principle that "the public ... has a right to every man's evidence." *United States v. Bryan*, 339 U.S. 323, 331 (1950). As such, they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant

> principle of utilizing all rational means for ascertaining truth." *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting). Accord, *United States v. Nixon*, 418 U.S. 683, 709-710, (1974).

Trammel v. United States, 445 U.S. 40, 50-51 (1980); *see also United States v. Reynolds*, 345 U.S. at 1, 9-10 ("judicial control over the evidence cannot be abdicated to the caprice of executive officers"); *United States v. Proctor and Gamble Co.*, 356 U.S. 677 (1958) (discussing the importance of discovery); *Hickman v. Taylor*, 329 U.S. 495, 507 (1946) (same).

Before recognizing privileges, this Court requires a showing of the balancing of competing interests. This Court's insistence on "clear and convincing evidence" of Congress' intent to preclude constitutional or statutory claims is consistent with this Court's own approach to establishing common law privileges under its authority in Federal Rule of Evidence 501. Privileges are in derogation of the fundamental principle of justice that there is a right to every man's evidence, restrict the search for truth by limiting the rights of discovery, and limit the right to pursue litigation to vindicate fundamental rights. Therefore, the Court requires a clearly defined public good before recognizing a privilege and a careful balancing of the conflicting public concerns.

In *University of Pa. v. E.E.O.C.*, 493 U.S. 182 (1990), the issue was whether federal courts should recognize a "peer review" privilege for universities and protect from disclosure peer review documents and records of deliberations of a plaintiff's tenure application. The evidence sought by the E.E.O.C. and plaintiff in *University of Pa.* was similar to the information Petitioners seek here – direct evidence of the decision makers' deliberations refusing the University's privilege request. This Court expressed its reluctance to recognize a privilege "where it appears that Congress has considered the relevant competing concerns and has not

provided the privilege itself." *Id.* at 189. The Court explained: "The balancing of conflicting interests of this type is particularly a legislative function." *Id.* The important phrase here and in *University of Pa.* is "balancing of conflicting interests." Evidence of balancing is necessary to establish that the asserted privilege "serves important private interests" as well as public interest. *Jaffe v. Redmond,* 518 U.S. 1 , 11 (1996). On one side of the balance are the fundamental right to every man's evidence and "the normally predominate principle of utilizing all available means for ascertaining the truth," *id.* at 9 (quoting *Tramell,* 443 U.S. at 50), and the duty of every citizen to give relevant evidence to vindicate both fundamental and statutory rights. *Id.* (citing *United States v. Bryan,* 339 U.S. at 323, 331). On the other side are competing public values such as national security or state secrets.

Pierce County, Wash. v. Guillen, 537 U.S. 129 (2003) recently upheld Congress' determination that data on traffic accidents at specific locations collected to support funding requests under the Federal Hazard Elimination Program (the "Program" or "HEP"), 23 U.S.C. § 152, should be barred from pretrial discovery and tort litigation. This Court's examination of the Program's legislative and statutory history clearly showed that Congress had balanced the competing public concerns in the light of its statutory objectives. *Id.* at 133-36. To encourage states and local governments to collect accident data without fear that the data would be used against them in tort litigation, Congress adopted 23 U.S. § 409, which prohibits information compiled in connection with the HEP from being "subject to discovery or admitted into evidence in Federal or state court proceedings ... in any action for damages" arising from "a location addressed in the § 152 data." *Id.* at 134 (quoting amended § 409). Congress clearly defined a narrow restriction on discovery in civil litigation in a way that protected the compelling interest in traffic safety, while at the same time allowing plaintiffs to pursue claims by other means. *Id.* at 146 (plaintiffs not any "worse off than they would have been had § 152 funding never existed").

Guillen illustrates Congress' balancing of competing public interests and its expression of its clear intent to create a narrow, well- defined privilege.

In contrast to 23 U.S.C § 409's clear language, neither 10 U.S.C § 618(f) nor DOPMA's legislative history provide clear and convincing evidence of Congress' intent to restrict judicial review or discovery. Section 618(f) has none of the specific language which this Court cited in its previous cases, *see St. Regis Paper* at 368 U.S. at 218, (citing 45 U.S.C. § 41 and 49 U.S.C. § 320(f)). In contrast to the provisions in *Guillen*, which did not make plaintiffs any worse off because they were free to obtain the necessary evidence through other means, *In re England's* bar on discovery of board proceedings also bars Petitioners' claims because there is no other way to establish the prejudice necessary to prove First and Fifth Amendment violations in chaplain selection board proceedings.

D. To Bar Constitutional or Statutory Claims, A Statute Must Show "Clear and Convincing" Evidence of Congressional Intent

This Court has consistently held that claims of a statutory bar to judicial review of constitutional or statutory claims must be supported by "clear and convincing evidence of congressional intent" to do so. *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974) (quoting *Abbott Laboratories v. Gardner*, 327 U.S. 139, 141 (1967)). In *Webster v. Doe*, 486 U.S. 592 (1988), this Court reemphasized the *Johnson* "heightened standard," *id.* at 603, and found that language in the National Security Act barring statutory claims did not contain the necessary specificity to show Congress' intent to bar constitutional claims. *Id.* at 603-04. Section 618(f) has no language that meets the *Johnson/Webster* standard.

This Court has consistently warned that "to deny any judicial forum for a colorable constitutional claim" raises constitutional issues. *Webster*, 486 U.S. at 603. Petitioners

argued that § 618(f)'s context, words, and placement show Congress intended that it be a housekeeping statute, protecting the board results between adjournment and their public release. This position is supported by § 101(f), DOD Instruction 1320.14 (guidance for conduct of selection boards) citing 10 U.S.C. § 616, not § 618(f), as the legal basis for not disclosing board proceedings, and Congress' own investigations into promotion board misconduct as shown in B above. Instead, the D.C. Circuit interpreted 10 U.S.C. § 618(f) in a way which raises, rather than avoids, constitutional issues as shown in I.C above and I.E andF below.

E. The Right to Petition for Redress Includes the Right to Seek Judicial Review

Barring discovery into board proceedings effectively extinguishes Petitioners' First Amendment right to petition for redress of constitutional violations. "The right of access to the courts is but one aspect of the right to petition." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). While even prisoners have this right, *Hudson v. Palmer*, 468 U.S. 517, 523 (1984), *In re England* effectively denies Petitioners this right as to unconstitutional misconduct on selection boards. *In re England* ignores this Court's admonition that "we would not lightly impute to Congress an intent to evade ... freedoms protected by the Bill of Rights, such as the right to petition...." *BE & K Construction Co. v. N.L.R.B.*, 536 U.S. 576, 525 (2002) (citation omitted).

In re England's comment that Petitioners remain free to pursue their constitutional claims that arise from promotion board misconduct without discovery, A-21, is absurd. To win on their claims that denomination rather than military merit was an illegal criteria for promotion, Petitioners must be able to provide evidence of board bias. *Washington v. Davis*, 426 U.S. at 239-40. As the District Court held, this can only come from board personnel, A-46-47, as clearly demonstrated by Respondents' own investigations into chaplain board

misconduct. Petitioners supported their motion to compel with evidence of such misconduct. *See* note 3 *supra* and A-127-131. Likewise, given the law of the case, *Adair*, 217 F.R.D. at 14-15, *In re England* effectively bars Petitioners' Due Process claim that the identification of each chaplain candidate's denomination to the board members influenced the board members' decisions.

The DODIG and NIG investigations of Chaplain Commander boards provide evidence that Catholics with poor records were selected over Protestants with perfect records because of denomination. Those boards denied promotions to Petitioners Blair, Farrell, Lavelle, and Quiles. *In re England* now denies discovery into those and other boards. A FY 92 Lieutenant Commander board recorder testifies at A-132 that the board selected an obese priest whose record was far inferior to others who were not selected, including Petitioner Hamme, who had a perfect record.[4] The recorder is willing to testify as to the board's discussion leading to the selection of the priest. *Id.* Absent testimony of board personnel, how do Petitioners show that their First and Fifth Amendment rights were violated by the board proceedings or establish the preference required by the District Court? The subtle processes which show denominational preference identified by one board member to the NIG can only be established through testimony of those who experienced it.

F. *In re England* Violates the Separation of Powers

"Courts sit to adjudicate controversies involving alleged denials of constitutional rights." *Lucas v. Forty-fourth General Assembly of Colorado*, 377 U.S. 713, 736 (1964). By holding that § 618(f) barred discovery and judicial review of

---

[4]The recorder's declaration was submitted as a supplement to his original declaration, A-125-26, in requesting en banc review.

board proceedings, *In re England* validates an illegal transfer of authority to declare the law and adjudicate constitutional issues without judicial review to the Secretary of the Navy. Congress does not have the power to do this. This Court has consistently held that "[t]he power to interpret the Constitution, in a case or controversy, remains in the Judiciary." *City of Boerne v. Flores*, 521 U.S. 507, 524 (1977).

II. *IN RE ENGLAND* CONFLICTS WITH OTHER COURTS OF APPEALS

The Ninth, Eleventh, and Federal Circuits require specific language showing Congress' intent to bar discovery into statutory and constitutional claims. In *Zambrano v. INS*, 972 F.2d 1122, 1125-26 (9th Cir. 1992), *rev'd on other grounds*, *Reno v. Catholic Social Services*, 509 U.S. 43 (1993), the Ninth Circuit not only required specific language to bar discovery, but also specifically rejected *In re England*'s application of *Baldridge v. Shapiro*, 455 U.S. 345 (1982). *Id.* (*Baldridge* involved statutes with specific exclusion language). In a similar chaplain's case, *Wilkins v. U.S.A.*, 99cv1579, the San Diego District Court relied on *Zambrano* to hold § 618(f) did not bar discovery and granted plaintiff's motion to compel, similar to the one the D.C. Circuit reversed. *United States v. U.S. Dist. Court for So. Cal.*, 384 F.3d at 1202, denied Respondents' appeal and mandamus petition.

In *In re Nelson*, the Eleventh Circuit held that a statute required specific language showing Congress' clear and convincing intent to bar discovery "in judicial proceedings." 873 F.2d 1396, 1397 (11th Cir. 1989). The Federal Circuit has held that "[o]nly upon a showing of 'clear and convincing evidence of congressional intent' may access to judicial review be restricted." *Nyeholt v. Secretary of Veterans Affairs*, 298 F.3d 1350, 1353 (Fed. Cir. 2002); *see also Jicarilla Apache Nation v. United States*, 60 Fed.Ct. 611, 613 (2004) (statute must have specific language to bar discovery). Because § 618(f) does not meet this criteria, discovery of board proceedings may take

place in the Ninth, Eleventh, and Federal Circuits, while it is barred in the D.C Circuit. Someone is wrong.

Ironically, both the Ninth and Eleventh Circuits cited *Freeman v. Seligson*, 405 F.2d 1326 (D.C. Cir. 1968) as supporting authority. The D.C. Circuit held in *Freeman* that "when Congress has thought it necessary to protect against court use of records it has expressly so provided by specific language." 405 F.2d at 1351. *Freeman* explained:

> The principle favoring full access to the courts and litigants to relevant information in the absence of strong competing considerations, is an important foundation for the achievement of justice by the courts in individual lawsuits. The principle is national policy of high rank, wholeheartedly endorsed and furthered by Congress. In the absence of a specific prohibition against disclosure in judicial proceedings, such as Congress set forth in some statutes, clear and strong indication is required before it may be implied that the policy of prohibition is of such force as to dominate the broad objective of doing justice.

Id. at 1348. *In re England* distinguished *Freeman's* holding and gnored its rationale, effectively reversing it.

III. *IN RE ENGLAND'S* HOLDING IGNORES THE RULES OF STATUTORY CONSTRUCTION

As shown in I.A above, *In re England* ignored 10 U.S.C. § 101(f) and interpreted "may" in the mandatory sense rather than "a permissive sense." A-20-21. Moreover, courts presume that Congress intended judicial review of administrative decisions and "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict judicial review." *Abbott Laboratories*

v. Gardner, 387 U.S. at 136, 141. *See also Barlow v. Collins*, 397 U.S. at 166-67 (same). There is no "clear and convincing evidence of contrary legislative intent" in § 618(f) or in DOPMA.

Courts interpret a statute's plain words in the context of the existing law when the statute was passed; courts presume Congress knows the law and drafts its legislation in light of court decisions. *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979). "Congress expects its statutes to be read in conformity with this Court's precedents." *Clay v. United States*, 537 U.S. at 527. *In re England* ignored this rule. Section 618(f) was passed in 1980, after *Abbott Laboratories*, *Johnson*, and other federal courts had required "clear and convincing evidence" of Congress' intent to bar discovery. Application of the law in 1980 makes § 618(f) merely a housekeeping statute.

IV. *IN RE ENGLAND'S* HOLDING UNDERMINES IMPORTANT NATIONAL POLICIES

A. *In re England* Creates a Safe Haven For Forbidden Prejudice

In re England's finding that § 618(f) bars discovery will shield racial, gender, and religious prejudice in board proceedings from judicial review and remedy. To argue that Congress intended to create a safe area for unconstitutional prejudice and misconduct is absurd, particularly without one word of such intent in DOPMA. *In re England* stands in stark contrast to the judiciary's leading role in national policies eliminating illegal bias. "Since the Civil War, the Federal Government and the federal courts have been the 'primary and powerful reliances' in protecting citizens against [invidious] discrimination." *Cannon*, 441 U.S. at 407 (quoting *Steffel v. Thompson*, 415 U.S. 452, 464 (1974). *In re England* would abdicate and reverse the historic role of federal courts "for vindicating every right given by the Constitution." *See*

Steffel, 415 U.S. at 463-64. *In re England* also contradicts Congress' intent "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny" as shown in Senate Report 102-482 and expressed in the Freedom of Information Act (FOIA). *See Department of Air Force v. Roe*, 425 U.S. 352, 361 (1975) (explaining FOIA's purpose).

B. *In re England* Encourages the Politicization of Religion

This Court has consistently warned against the fusion of government and religious functions, *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 126 (1982), and the resulting "political fragmentation on sectarian grounds." *E.g., Larsen*, 456 U.S. at 252-53, 244-46. Petitioners' evidence supporting their allegations of denominational preference in chaplain promotions, including the Respondents' own investigations, evidences a "political fragmentation based on sectarian grounds."

Petitioners represent a broad spectrum of the non-liturgical community. Petitioner CFGC represents approximately 7.5 million Charismatic Christians. The Southern Baptist Convention (over 16 million members) and the Associated Gospel Churches (4.5 million) have passed resolutions condemning the Navy's religious prejudice against their Navy chaplains and members. A-134-136 and A-137-138 respectively. Petitioners can identify other faith groups which have expressed concern over Respondents' prejudice against their chaplains and Navy members. Yet *In re England* fosters sectarian strife by allowing the issue of religious prejudice to fester unaddressed by creating a unique safe haven for religious bias and favoritism.

V. SUPREME COURT DIRECTION AND GUIDANCE ON STRICT SCRUTINY IS NEEDED

Respondents' chaplain promotion boards have five or six members, 10 U.S.C. § 612, who vote in secret, the majority of whom SECNAVINST 1401.3 requires be chaplains. Respondents' own investigations into board misconduct show that a single "zero" ensures that a candidate is not selected. Petitioners challenge the entire chaplain selection process on First and Fifth Amendment grounds. The Court of Appeals noted that chaplains are "unique" Naval officers because they are denomination representatives hired to conduct religious services, A-4, but failed to apply that finding to the issue before it, despite Petitioners' request. A-25. This should be an abuse of discretion because of the apparent First Amendment issues, this Court's guidance, and the District Court's clear error.

A. Courts Have a Duty to Carefully Examine Establishment Clause Claims

"What our cases require is careful examination of any law challenged on establishment grounds with a view to ascertain whether it furthers any of the evils against which that Clause protects." *Committee for Public Education v. Nyquist*, 413 U.S. 756, 772 (1973); *County of Allegheny v. ACLU*, 492 U.S. 593, 609 (1989) (explaining court's duty of "unwavering vigilance" against Establishment Clause violations). Having specifically noted the unique role of chaplains as denominational representatives who are on loan from their faith communities, hired to perform religious services, and military officers, A-4, the Court of Appeals then declined to consider the obvious implications of its definition which contradicted the District Court's holding that chaplains sat on promotion boards as "Naval officers," not denominational representatives. *See Adair*, 183 F.Supp.2d at 62, A-107. *In re England*'s definition of chaplains as denominational representatives brings them under the rule of

Bd. of Education of Kiryas Joel v. Grummet, 512 U.S. 657, 698-99 (1994), that the Sovereign's power may not be delegated to persons defined by their religious identity. The application of strict scrutiny would have resolved the Establishment Clause issue and made the Respondents' appeal moot and void.

This Court recently reemphasized that courts are to vindicate First Amendment rights in a manner that prevents "undue delay." *City of Littleton, Colo. v. Z. J. Gifts D-4, LLC*, 124 S.Ct. 2219 (2004). These cases will soon enter their sixth year, and the fundamental question of whether strict scrutiny applies when denominational representatives exercise the sovereign's power in awarding or denying government benefits has not been resolved by an appellate court. Having been asked to consider an obvious error that unduly delayed resolution of important First Amendment rights and values, the Court of Appeals abused its discretion in not examining the issue "with a view to ascertain whether it furthers any of the evils against which [the Establishment] Clause protects." *Committee for Public Ed.*, 413 U.S. at 772.

B. The District Court's Holding That No First Amendment Concerns Arise when Denominational Representatives Exercise the Sovereign's Power Is Clear Error.

The District Court's holding that no First Amendment claims arise when the sovereign's discretionary authority to award or terminate government benefits to denominational representatives is delegated to other denominational representatives, A-102-113, was clear error for four reasons. First, the holding conflicts with the rule that government may not "deliberately delegate discretionary power to an individual, institution, or community on the ground of religious identity", *Bd. of Education of Kiryas Joel v. Grummet*, 512 U.S. at 699, without "effective guarantees" that the power would be used for secular, neutral, and non-ideological

purposes. 512 at 703 (citing *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125 (1982)).

Second, the district court applied the *rebuttable* presumption of regularity in an *irrebuttable* manner. *See Adair*, 183 F.Supp.2d at 60, A-104. This Court has found that irrebuttable presumptions raise Due Process concerns when fundamental interests are at issue. *See Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632 (1974); *Stanley v. Illinois*, 405 U.S. 645 (1972). Here First and Fifth Amendment rights are at issue.

Third, the district court's conclusion that the First Amendment did not apply because chaplains were "first and foremost" officers, A-107, is contrary to this Court's presumption that persons or groups defined by their religious identity are presumed to advance their faith perspectives and their entanglement with the Sovereign requires strict scrutiny because "the conflict of function inheres in the situation." *Larkin*, 459 U.S. at 125 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 627 (1971)). In *Lemon*, the presumption was applied to government-funded sectarian school teachers teaching non-religious subjects.

Fourth, the District Court's dismissal of Petitioners' constitutional claim on a motion to dismiss is contrary to *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Exhibit 6 of Petitioners' Complaint provides evidence that denomination was a fact in promotion. If the Complaints' allegations of misconduct on boards were taken as true, the presumption of regularity could not apply. Given access to board personnel, Petitioners can prove facts that rebut the assumption.

C. This Court Should Define the Proper Application of Strict Scrutiny

The failure of the District Court to apply the appropriate standard of strict scrutiny has unnecessarily prolonged this case and other Establishment Clause violations.

On June 5, 2003, Petitioners filed a motion for a structural injunction to force the Navy to stop preferential treatment for over-age Catholic active duty Naval Reserve chaplains. *CFGC* Doc. No. 142. 10 U.S.C. § 14509 limits Reservists' active duty service to age 60. 10 U.S.C. § 14703(a) allows the Secretary to extend chaplains above the grade of Lieutenant Commander to age 67. Petitioners identified at least 16 Catholic Reserve LT and LCDR chaplains on active duty who exceed the statutory age limit of 60, seven were over 67, and four were in their 70s. Although they have not met the statutory requirements for retirement, the Navy categorizes the seven "over age 67" chaplains as "retired reserve on active duty" to allow these Catholics to reach the 20 years active duty required for a pension. Only Catholics are allowed to remain on active duty beyond the statutory age limits to qualify for government pensions. The District Court has yet to rule on this injunction, despite the obvious preference, the applicability of strict scrutiny, and both statutory and Establishment Clause violations.

Petitioners filed a Writ of Mandamus seeking to order the Navy to follow its own regulations and not prefer Catholic clergy. *CFGC*, 276 F.Supp.2d 82 (D.D.C. 2003). To hide violations of its Reserve recall policy, the Navy recalled a Catholic Reserve chaplain as a flight surgeon. Since the Complaint's allegations included favoritism, the District Court denied the Writ. *Id.* at 84. Strict scrutiny should have produced a different result.

CONCLUSION

Standing at the intersection of the Free Exercise and Establishment Clauses, these cases raise fundamental First Amendment issues of first impression. This Court has often cited military chaplains as examples of the accommodation available in the Constitution and the "play in the joints" of these two clauses. *See School Board of Abington Township v. Schempp*, 374 U.S. at 296-98 (Brennan, J. concurring, citing

chaplains as accommodation necessary to provide for the free exercise of religion by military personnel). The question posed by this petition is whether the Navy must follow the Constitution in all of its practices and procedures, or whether it may set its own course, independent of law and judicial accountability. For all the above reasons, the Court should grant this Petition for Certiorari.

Respectfully Submitted,

Of Counsel
John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
P. O. Box 7482
Charlottesville, VA 22906
(434) 978-3888

Arthur A. Schulcz, Sr.
Affiliated Attorney
with The Rutherford
Institute
2521 Drexel Street
Vienna, VA 22180
(703) 645-4010
Counsel of Record for
Petitioners

December 17, 2004

No. _____

In The Supreme Court of the United States

CHAPLAINCY OF FULL GOSPEL CHURCHES, ET AL., AND ROBERT H. ADAIR, ET AL.,

Petitioners,

v.

GORDON R. ENGLAND, SECRETARY OF THE NAVY, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDIX

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
Post Office Box 7482
Charlottesville, Virginia 22906
(434) 978-3888
Of Counsel

Arthur A. Schulcz, Sr.
Affilliated Attorney with
The Rutherford Institute
2521 Drexel Street
Vienna, Virginia 22180
(703) 645-4010
Counsel of Record

Date: December 20, 2004

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

APPENDIX

Decision of the United States Court of Appeals in *In re England* A-1

Order of the United States Court of Appeals Denial of Petition for *En Banc* Review A-24

Order of the Court of Appeals amending its order denying the Petitioners' Petition for Rehearing *En Banc* A-25

Opinion and judgment of the District Court for the District of Columbia granting the Petitioners' motion to compel discovery, *Chaplaincy of the Full Gospel Churches v. Johnson*, 217 F.R.D. 250 (D.D.C. 2003) A-26

Opinion of the District Court for the District of Columbia denying in part and granting in part Respondents' motion to dismiss, *Adair v. England*, 183 F. Supp. 2d 31 (D.D.C. 2002) A-47

10 U.S.C. § 618 Action on reports of selection boards . A-109

EXHIBITS IN SUPPORT OF MOTION TO COMPEL

Declaration of Gary Paul Stewart A-113

Declaration of Klon K. Kitchen, Jr. A-115

Affidavit of Floyd Cedric Ellison A-117

Declaration of Gary Paul Stewart (Supplemental) A-120

June 13, 2001, Southern Baptist Convention Resolution No. 7 on Discrimination Against Military Chaplains . A-122

8 AUGUST 2001 Associated Gospel Churches Resolution Regarding Alleged Religious Discrimination Against Military Chaplains Serving in the U.S. Navy A-125

Glossary A-127

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 22, 2004 Decided July 27,2004

No. 03-5329

In re: Gordon R. England, Secretary of the Navy, et al.,
Petitioners
Consolidated with
03-5333, 03-5334

On Petition for Writ of Mandamus and
Appeals from the United States District Court
for the District of Columbia
(No. 00cv00566)
(No. 99cv02945)

Robert M. Loeb, Attorney, U.S. Department of Justice, argued the cause for petitioners/appellants. With him on the briefs were *Peter D. Keisler*, Assistant Attorney General, *Roscoe C. Howard, Jr.*, U.S. Attorney, and *Marleigh D. Dover*, Attorney.

Arthur A. Schulcz, Sr. argued the cause and filed the brief for respondents/appellees.

Before: GINSBURG, *Chief Judge*, and GARLAND and ROBERTS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROBERTS.

ROBERTS, *Circuit Judge*:

Navy chaplains, like other Navy officers, are recommended for promotion by "selection boards" consisting of superior officers who meet and discuss the relative merits of candidates for promotion. The federal statute establishing the procedures for such selection boards, which applies to all the armed services, provides that board proceedings "may not

be disclosed to any person not a member of the board," 10 U.S.C. § 618(f), and board members take an oath of confidentiality to implement this requirement. Certain current and former Navy chaplains and their particular endorsing agency, the Chaplaincy of Full Gospel Churches (CFGC), sued the Navy, alleging that it discriminates against chaplains affiliated with the CFGC in, among other things, promotion decisions. The chaplains and the CFGC sought to compel the Secretary of the Navy to release selection board members from their oath of confidentiality, to allow them to testify about selection board proceedings leading to the challenged decisions.

The district court ruled that Section 618(f) did not preclude disclosure of selection board proceedings through civil discovery, because Congress had not expressly addressed the question of such discovery in providing that board proceedings "may not be disclosed." The court accordingly ordered the Secretary to release selection board members from their oath. We reverse and hold that Section 618(f) bars the disclosure through civil discovery of promotion selection board proceedings.

I. Background

A. The History and Organization of Navy Chaplains

In November 1775, the Continental Congress adopted the first regulations to govern the fledgling Continental Navy. *See* Rules for the Regulation of the Navy of the United Colonies of North America (Nov. 28, 1775), *reprinted in relevant part in* 1 Clifford M. Drury, *The History of the Chaplain Corps, United States Navy* 3 (Bureau of Naval Personnel 1984). Although those regulations did not expressly create a chaplain position, Article 2 provided that "[t]he Commanders of the ships of the thirteen United Colonies, are to take care that divine service be performed twice a day on board, and a sermon preached on Sundays, unless bad weather or other

extraordinary accidents prevent." *Id.* These duties often fell to the captain himself or a designee: only two chaplains were known to have served in the Continental Navy during the Revolutionary War, and the Navy limited the number of chaplains on active duty to nine until 1842 and to 24 from then until 1914. Drury, *supra*, at 5, 62.

Early chaplains were responsible for educating midshipmen and sailors in addition to their religious duties. The Navy placed great emphasis on the chaplains' role as teacher, selecting them "more for their teaching ability than for their experience or training as ministers." *Id.* at 18. Indeed, the first "naval academy" was established 200 years ago at the Washington Navy Yard by Chaplain Robert Thompson, who taught midshipmen mathematics and navigation. *Id.* at 18- 20. The success of that academy led to the establishment of the United States Naval Academy at Annapolis, Maryland in 1845.

From those beginnings, the Navy Chaplain Corps has grown with the service to over 800 strong. It is the responsibility of Navy chaplains to "provide for the free exercise of religion for all members of the [Navy and Marine Corps], their dependents, and other authorized persons." Directive No. 1304.19, Appointment of Chaplains for the Military Services ¶ 3 (Dep't of Def. Sept. 18, 1993) (Directive). The Navy chaplain's mission is to accommodate the religious needs of sailors and Marines by providing religious services, counseling, and support. *See* Marine Corps Warfighting Publication 6-12, *Religious Ministry Support in the United States Marine Corps* 1-4, 1-5 (Dec. 12, 2001). In addition to this religious ministry, Navy chaplains also provide ethics instruction and critical incident debriefings, and advise commanders on religious, moral, and ethical issues. *Id.* at 1-5.

A Navy chaplain's role within the service is "unique," involving simultaneous service as clergy or a "professional representative[ ]" of a particular religious denomination and as a commissioned naval officer. OPNAVINST 1730.1,

Chaplains Manual 1-2-1-3 (Dep't of the Navy Oct. 3, 1973). A chaplain must satisfy not only the normal physical and educational requirements to become a commissioned officer, but also must have a graduate level theology degree or equivalent and an ecclesiastical endorsement -- official notice from a faith group endorsing agency that a candidate "is professionally qualified to *represent* that faith group within the military Chaplaincy." Chaplain Candidate Program Officer Handbook Glossary; *see* Directive ¶¶ 5.1-5.2. Ecclesiastical endorsement must be maintained throughout a chaplain's career; withdrawal of ecclesiastical endorsement at any point in a chaplain's career could result in separation from the Navy. Directive ¶ 5.1.4.

The Navy categorizes chaplains into four general religious categories or "faith groups" according to similarities in religious denominations: Roman Catholic, Liturgical Protestant, Non-Liturgical Protestant, and Special Worship. Liturgical Protestant primarily includes those protestant denominations that trace their origins to the Protestant Reformation and whose religious services are characterized by a set liturgy or order of worship, including the Lutheran, Episcopal, Methodist, and Presbyterian denominations. CFGC Second Am. Compl. ¶ 12(a) (CFGC Compl.). Non-Liturgical Protestant refers to protestant denominations "without a formal liturgy or order in their worship service" whose clergy do not wear religious dress during services, comprising the Baptist, Evangelical, Pentecostal, Bible, and Charismatic churches. *Id.* ¶ 12(b). The Special Worship category includes the Christian Orthodox, Jewish, Muslim, and Mormon faiths. Appellants' Br. at 5.

B. The Personnel System

The Navy uses the same personnel system for all officers, including chaplains. That system seeks to manage officers' careers to provide the Navy with the best qualified personnel through three critical personnel decisions: (1)

promotion; (2) continuation on active duty; and (3) selective early retirement. A naval officer must be recommended by a promotion selection board to advance in rank from lieutenant (junior grade) through rear admiral (lower half). *See* 10 U.S.C. § 611(a). Continuation on active duty decisions occur when the needs of the Navy require the selection of certain officers -- otherwise subject to discharge or retirement for failing to be promoted to the next rank -- to continue on active duty for an established period of time. *See id.* § 637(a)(1), (d). Conversely, selective early retirement decisions generally involve the selection of officers in the grade of captain who were passed over for promotion two or more times for involuntary, early retirement. *Id.* § 638(a)(1).

Each of these personnel decisions involves a selection board comprised of naval officers who deliberate, make selections, and then submit their recommendations to the Secretary of the Navy. Promotion selection boards are convened under 10 U.S.C. § 611(a); continuation on active duty and selective early retirement boards are convened under 10 U.S.C. § 611(b). Selection boards must consist of five or more active-duty naval officers who "must be serving in a grade higher than the grade of the officers under consideration by the board, except that no member of a board may be serving in a grade below ... lieutenant commander." 10 U.S.C. § 612(a)(1). At least one member of the board must be from the category being considered; thus, if a selection board is considering chaplains, at least one board member must be a chaplain. *See id.* § 612(a)(2)(A).

Promotion selection boards may only consider an eligible officer's official military personnel file and the selection board "precept" issued to the board by the Secretary of the Navy. *See* 10 U.S.C. § 615(a), (b). A precept is the Secretary's official guidance to the board, consisting of: (1) the maximum number of officers that the board may recommend for promotion, (2) "information or guidelines relating to the needs of the [Navy] for officers having particular skills," and

(3) applicable guidelines from the Secretary of Defense. *Id.* § 615(b). A promotion selection board considers these items and recommends those officers "whom the board ... considers best qualified for promotion." *Id.* § 616(a).

The promotion board reports its recommendations to the Secretary, 10 U.S.C. § 617(a), who takes action on the report in accordance with Section 618. If the Secretary "determines that the board acted contrary to law or regulation or to guidelines furnished the board under Section 615(b)," the Secretary must return the board's recommendations with a written explanation for further proceedings. *Id.* § 618(a)(2). The Secretary otherwise reviews the board's recommendations and adopts or modifies the list, and then forwards it to the President through the Chairman of the Joint Chiefs of Staff and the Secretary of Defense. *See id.* § 618(b), (c). The President ultimately appoints recommended officers for promotion to the next rank, subject to confirmation by the Senate for promotions above the rank of lieutenant (junior grade). *See id.* § 624.

The other statutory selection boards – continuation on active duty and selective early retirement -- are convened under Section 611(b) and have somewhat different procedures. The Secretary has final authority over these boards, and no Presidential or Senatorial action is involved. In addition, unlike the situation with promotion boards, there are no statutory guidelines that dictate what information other statutory selection boards may consider.

By statute, each member of a selection board must take an oath to perform his duties "without prejudice or partiality and having in view both the special fitness of officers and the efficiency of [the Navy]." 10 U.S.C. § 613. As noted, members of promotion selection boards may not disclose the proceedings of the board to anyone not a member of the board, "[e]xcept as authorized or required by [Section 618]." *Id.* § 618(f). Navy regulations also require all selection board

members to take an oath to "not divulge the proceedings of this board except as authorized or required by the Secretary of the Navy or higher authority." Mem. in Support of Mot. for an Order Requiring Def. Secretary of the Navy to Release Personnel Associated with Chaplain Promotion Boards from their Oath Not to Disclose Promotion Board Proceedings (Oct. 29, 2002) (Pls.' Mot.), Ex. 1, Oaths; *see* also SECNAV Instruction 1420.1A, Promotion and Selective Early Retirement of Commissioned Officers on the Active Duty Lists of the Navy and Marine Corps ¶ 12(f) (Dep't of the Navy Jan. 8, 1991) ("Each member ... shall swear or affirm that he or she will not disclose the proceedings or recommendations of the board except as authorized or required by SECNAV or higher authority.").

Section 618(f) was enacted as part of the Defense Officer Personnel Management Act (DOPMA), Pub. L. No. 96-513, 94 Stat. 2835 (1980) (codified in scattered sections of 10 U.S.C.). Through DOPMA, Congress sought to update the existing statutory framework for military promotions established by the Officer Personnel Act of 1947, Pub. L. No. 80-381, 61 Stat. 795, by eliminating the services' individual promotion systems in favor of "a single, permanent promotion system under a single, applicable statutory grade table and under laws that would be the same for each service." S. Rep. No. 96-375, at 3 (1979). Section 618(f) codified in a uniform manner the established practice in the individual services of barring the disclosure of selection board proceedings. *See, e.g., Brenner v. United States*, 202 Ct. Cl. 678, 686 (Ct. Cl. 1973) ("The proceedings of selection boards are secret.") (Navy); *Sanders v. United States*, 594 F.2d 804, 815 (Ct. Cl. 1979) (en banc) ("Selection board proceedings are secret") (Air Force); Army Regulation 624-100, Promotion of Officers on Active Duty ¶ 2-8 (Oct. 20, 1975).

C. Procedural History

Plaintiffs -- current and former Non-Liturgical

Protestant chaplains and their endorsing agency, the Chaplaincy of Full Gospel Churches (CFGC) (collectively "Chaplains") -- filed two separate suits against the Secretary of the Navy, other Navy officials, and the Navy (collectively "Navy"), alleging that "the Navy has established, promoted, and maintained religious quotas and other discriminatory practices in the Navy Chaplain Corps in violation of the First and Fifth Amendments." *Chaplaincy of Full Gospel Churches v. Johnson*, 217 F.R.D. 250, 253 (D.D.C. 2003) (CFGC); *see also Adair v. England*, 217 F. Supp. 2d 7, 8 (D.D.C. 2002). The district court subsequently consolidated the cases for purposes of all pretrial motions. *Adair*, 217 F. Supp. 2d at 8. The Chaplains allege that the Navy's discriminatory practices favor Catholic and Liturgical Protestant chaplains to the detriment of Non-Liturgical Protestant chaplains. *See* CFGC Compl. ¶¶ 3, 56-63.

As pertinent here, the Chaplains allege that the Navy discriminates against chaplains endorsed by the CFGC through promotions and retention. *See CFGC*, 217 F.R.D. at 253. The Chaplains claim that this discrimination is manifested in the policies for and operation of promotion and other statutory selection boards, permitting "religious bias" and "denominational issues" -- criteria not related to career performance -- to interfere with the proper selection of the best-qualified chaplains for advancement. Adair Class Action First Am. Compl ¶. 50 (Adair Compl.); *see CFGC*, 217 F.R.D. at 253-54. The Chaplains allege that the Navy: (1) provided promotion boards with each candidate's religious denomination, CFGC Compl. ¶ 69; (2) used religious quotas and denominational criteria for promotion and forced retirement selections, Adair Compl. ¶ 50; (3) denied promotions based upon ideological criteria, *see id.*; and (4) "stacked" promotion and other statutory selection boards with Catholic and Liturgical Protestant chaplains, *id.* ¶ 47.

The Chaplains requested that the Secretary release board members from their oath of confidentiality to allow them to testify; the Secretary declined to do so. The Chaplains

thereupon filed a motion to compel discovery of selection board proceedings, seeking to depose board members. *See* Pls.' Mot. The Navy argued that 10 U.S.C. § 618(f) barred disclosure of selection board deliberations. The district court disagreed and granted the Chaplains' motion, holding that "[b]ecause section 618(f) does not contain specific language barring discovery, and because of the circuit's emphasis on providing litigants full access to relevant information, the court concludes that section 618(f) does not create an absolute or qualified privilege barring discovery of selection-board proceedings." 217 F.R.D. at 260. The Navy filed an interlocutory appeal and a petition for mandamus, which we consolidated.

II. Appellate Jurisdiction

This court has appellate jurisdiction over "final decisions" of the district court. 28 U.S.C. § 1291; *DSMC, Inc. v. Convera Corp.*, 349 F.3d 679, 682 (D.C. Cir. 2003). Discovery orders are accordingly generally appealable only upon a final decision in the case, not on an interlocutory basis. *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 353 (D.C. Cir. 1995). The Navy nonetheless argues that we have interlocutory jurisdiction to hear its appeal under the collateral order doctrine. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

"The collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (quoting *Cohen*, 337 U.S. at 546). The collateral order doctrine allows appeals from the "small category" of decisions "that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42 (1995); *see United States v. Philip Morris Inc.*, 314 F.3d 612, 617 (D.C. Cir. 2003).

1. It is undisputed that the district court conclusively ordered the Navy to release board members from their oaths not to disclose board proceedings. The district court considered and rejected all the Navy's arguments opposing the motion to compel, and, with respect to the question on appeal, concluded that "section 618(f) does not create an absolute or qualified privilege barring discovery of selection-board proceedings." *CFGC*, 217 F.R.D. at 260. The first requirement is satisfied.

2. To satisfy the second requirement under the collateral order doctrine, the Navy must show that "appellate review will resolve an *important* issue completely *separate* from the merits of the action." *Philip Morris*, 314 F.3d at 617 (emphases added). Determining whether Section 618(f) bars discovery in this case does not require this court to consider the merits of the Chaplains' constitutional claims; the separability prong of the second requirement is clearly satisfied.

"Importance" is a more subjective inquiry. The Supreme Court has explained that this inquiry requires a "judgment about the value of the interests that would be lost through rigorous application of [the] final judgment requirement," and that " 'important' in *Cohen*'s sense [means] being weightier than the societal interests advanced by ordinary operation of final judgment principles." *Digital Equip.*, 511 U.S. at 878- 79. This court has explained that an issue is important under *Cohen* "if the interests that would potentially go unprotected without immediate appellate review of that issue are significant relative to the efficiency interests sought to be advanced by adherence to the final judgment rule." *Philip Morris*, 314 F.3d at 617 (quoting *In re Ford Motor Co.*, 110 F.3d 954, 959 (3d Cir. 1997)).

In *Philip Morris*, we analyzed whether the collateral order doctrine provided appellate jurisdiction to hear an interlocutory appeal challenging denial of an attorney-client

privilege claim. The court held that the attorney-client privilege was "important" under *Cohen*, concluding that "the institutional benefits of allowing interlocutory review of attorney-client privilege claims outweigh the costs of delay and piecemeal review that may result." *Philip Morris*, 314 F.3d at 618. The court explained that the privilege " 'encourage[s] full and frank communication between attorneys and their clients' " and "promotes 'broader public interests in the observance of law and administration of justice.' " *Id.* (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); alteration in *Philip Morris*). Those "important institutional interests" would be "eviscerate[d]" by an erroneous privilege ruling, underscoring the importance of interlocutory review. *Id.*

The Navy argues that Section 618(f) similarly creates a privilege that protects the deliberations of military promotion boards from disclosure. According to the Secretary of the Navy, "[f]ree, uninhibited, and candid deliberations by selection boards are ... vital to the effective functioning of the selection board process," and disclosure of board proceedings would "severely undermine the ability ... of the Navy to effectively operate its promotion and selective early retirement system." Decl. of Gordon R. England, p 9 (England Decl.). The proper application of Section 618(f) therefore implicates institutional interests in the proper administration of the armed forces.

The statutory nature of the claimed privilege also supports a finding of importance under *Cohen*. In *Digital Equipment*, the Supreme Court suggested that "[w]here statutory and constitutional rights are concerned," it is easier to conclude that they are "weightier than the societal interests advanced by the ordinary operation of final judgment principles." 511 U.S. at 879. We cannot say that the importance of the interests assertedly protected by Congress through Section 618(f) should be subordinated to the general interest in avoiding litigation delay and piecemeal review. If it is correct about the critical nature of the protection from

disclosure provided by Section 618(f), the Navy should not lose the benefit of that protection prior to appellate review.

3. To satisfy the final requirement for invoking the collateral order doctrine, the appellant must show that the district court's order "will be effectively unreviewable on appeal from a final judgment." *Philip Morris*, 314 F.3d at 617. In *Philip Morris*, this court determined that a party's claim of attorney-client privilege would be "effectively unreviewable" because disclosure of privileged material "would mak[e] the issue of privilege effectively moot" on appeal. 314 F.3d at 619. "Disclosure followed by appeal after final judgment is obviously not adequate in [privilege] cases -- the cat is out of the bag." *In re Papandreou*, 139 F.3d 247, 251 (D.C. Cir. 1998).

So too here. The right at issue -- the Navy's claim of statutory privilege -- would be destroyed if board members were compelled to testify; there would be no privilege to protect on appeal from final judgment. "It would be impossible for [this] court to sort out and redress the harm caused by the incorrect disclosure." *Philip Morris*, 314 F.3d at 619.

Having found that this interlocutory appeal satisfies the *Cohen* requirements, we hold that the collateral order doctrine provides appellate jurisdiction to review the district court's order.[1] We now turn to the merits of the Navy's claim

---

[1] In a related case, the Ninth Circuit summarily dismissed for lack of jurisdiction a similar appeal from an order requiring disclosure, citing *Bank of America v. National Mortgage Equity Corporation*, 857 F.2d 1238 (9th Cir. 1988). *Wilkins v. United States*, No. 04-55046 (9th Cir. Apr. 27, 2004) (unpublished order). That dismissal does not conflict with our finding of jurisdiction here because the case our sister circuit relied upon -- Bank of America -- did not consider whether the collateral order doctrine provided appellate jurisdiction. *See Bank of America*, 857 F.2d at 1239 (determining whether court had appellate jurisdiction under an exception for third parties aggrieved by a discovery order). On the same day that it issued the order dismissing the Government's appeal, the Ninth Circuit also ordered that the Government's parallel petition for mandamus be

of statutory privilege.

III. Merits

The Federal Rules of Civil Procedure encourage the exchange of information through broad discovery. Federal Rule of Civil Procedure 26(b)(1) authorizes "discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." The district court concluded that the selection board proceedings at issue in this case are relevant to the Chaplains' claims, and thus are discoverable under Rule 26(b)(1). The Navy argues, however, that Section 618(f) creates a statutory privilege barring the disclosure of selection board proceedings. Although the terms of a statute should be strictly construed "to avoid a construction that would suppress otherwise competent evidence," *St. Regis Paper Co. v. United States*, 368 U.S. 208, 218 (1961), if there is a valid statutory privilege, then "information may be withheld, even if relevant to the lawsuit and essential to the establishment of plaintiff's claim." *Baldridge v. Shapiro*, 455 U.S. 345, 360 (1982).

1. We begin with the plain language of the statute in question. "It is well established that 'when the statute's language is plain, the sole function of the courts -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms.' " *Lamie v. United States Tr.*, 124 S. Ct. 1023, 1030 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). Section 618(f) provides, in full:

> Except as authorized or required by this section, proceedings of a selection board convened under section 611(a) of this title may

---

referred to a merits panel. *See United States v. Wilkins*, No. 04-70709 (9th Cir. Apr. 27, 2004) (unpublished order). Disclosure in Wilkins has been stayed pending resolution of that petition.

> not be disclosed to any person not a member of the board.

This is the language of command -- "may not be disclosed" -- in a context in which commands are expected to be obeyed. There is no inherent ambiguity in the phrase "may not be disclosed" that would justify departing from those plain terms pursuant to a judicially-crafted exception.

That conclusion is fortified by the fact that Congress provided an express exception to the otherwise categorical ban on disclosure. The opening clause of Section 618(f) provides an exception for disclosures "authorized or required" by Section 618 itself. In other words, the drafters of Section 618(f) wrote the ban on disclosure in such broad and absolute terms that they felt the need to specify that board proceedings *could* be disclosed in connection with the very reason you have them -- to submit recommendations to the Secretary of a military department, the Secretary of Defense, and ultimately the President for action under Section 618.

Section 618 also directs the Secretary of a military department to review the board reports "to determine whether the board has acted contrary to law or regulation or to guidelines furnished the board." 10 U.S.C. § 618(a)(1). A Department of Defense Instruction accordingly permits the Secretary of a military department to release board members from the confidentiality requirements if "the integrity of the board's proceedings has been affected by improper influence of senior military or civilian authority, misconduct by the board president or a member, or any other reason." Instruction 1320.14, Commissioned Officer Promotion Program Procedures ¶ 6.2.1.3 (Dep't of Def. Sept. 24, 1996); *accord id.* ¶¶ 6.2.2.5, E4.1.6. Contrary to the Chaplains' contention, the fact that the Secretary of the Navy exercised this authority in connection with Inspector General inquiries in 1997 and 1998 does not support implying an additional exception for civil discovery. The statute makes no provision for disclosure

pursuant to the Federal Rules of Civil Procedure, even as it does for disclosure pursuant to Section 618 itself, and we are reluctant to imply an additional exception for that purpose. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 109 (1980) (declining to imply an exception to Consumer Product Safety Act restrictions on disclosure of accident reports for disclosures under FOIA; "[i]f Congress had intended to exclude FOIA disclosures from [the statutory restrictions] it could easily have done so explicitly ... as it did with respect to the other listed exceptions.... We are consequently reluctant to conclude that Congress' failure to include FOIA requests within the exceptions ... was unintentional."). "When Congress provides exceptions in a statute, it does not follow that courts have authority to create others." *United States v. Johnson*, 529 U.S. 53, 58 (2000); *see also Detweiler v. Pena*, 38 F.3d 591, 594 (D.C. Cir. 1994) ("Where a statute contains explicit exceptions, the courts are reluctant to find other implicit exceptions.").

"[W]here the terms of a statute are unambiguous, judicial inquiry is complete," *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 642 (1990), and resort to "the more controversial realm of legislative history" is unnecessary. *Lamie*, 124 S. Ct. at 1031. We find it "instructive," however, *id.* at 1033, to note that such history as there is fully comports with our plain language reading, and that nothing in that history remotely suggests that Congress intended an unexpressed exception to the ban on disclosure for civil discovery.

Disclosure of selection board proceedings in civil discovery would certainly undermine, if not totally frustrate, the purpose of Section 618(f). As the Secretary of the Navy explained in his declaration, "[s]election board members will be less likely to engage in frank and open discussion if such discussions will be open to public scrutiny." England Decl., ¶ 9. If board members knew that candidates passed over for promotion could gain access to board proceedings, that would clearly inhibit frank assessment of candidates' relative

strengths and weaknesses. As Secretary England explained:

> [D]etermining which officers are best qualified for promotion from a pool of many fully qualified candidates involves inherently difficult and subjective evaluations. ... Release of information regarding these proceedings to the public will severely undermine the ability of the Department of the Navy to effectively operate its promotion and selective early retirement systems.

Id.

2. The Supreme Court has addressed the question of whether broad, statutory bans on disclosure should be applied according to their terms, when doing so interferes with a civil litigant's effort to obtain discovery of relevant material under Federal Rule of Civil Procedure 26. In *Baldridge v. Shapiro*, 455 U.S. at 348-52, two municipalities sued the Department of Commerce, seeking to obtain from the Census Bureau raw census data -- including individual respondents' questionnaires -- to challenge the results of the 1980 census. Section 8(b) of the Census Act, 13 U.S.C. § 8(b), provided in relevant part that "the Secretary [of Commerce] may furnish copies of tabulations and other statistical materials which do not disclose information reported by, or on behalf of, any particular respondent." Section 9(a) of the Act, 13 U.S.C. § 9(a), provided that:

> Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title --
>
> . . .
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency there- of to examine the individual reports.

The Court recognized that the discovery rules

"encourage open exchange of information," and quoted the admonition in *St. Regis Paper* to avoid construing statutes to suppress otherwise competent evidence. 455 U.S. at 360. The Court nevertheless held that the "unambiguous language of the confidentiality provisions," *id.* at 355, barred discovery of the protected information:

> Congress, of course, can authorize disclosure in executing its constitutional obligation to conduct a decennial census. But until Congress alters its clear provisions under ss 8(b) and 9(a) of the Census Act, its mandate is to be followed by the courts.

Id. at 362.

The Court noted that Congress's purpose in barring disclosure was to promote the success and accuracy of the census by assuring the public that responses would be kept confidential, and that "[d]isclosure by way of civil discovery would undermine the very purpose of confidentiality contemplated by Congress." *Id.* at 361. The Constitution expressly authorizes Congress to conduct a census "as they shall by Law direct," U.S. CONST. art. I, § 2, cl. 3, and the Court concluded that Congress's "wisdom" in barring all disclosure of individual information "is not for us to decide in light of Congress' 180 years' experience with the census process." *Id.*

3. The district court took a different approach here and declined to apply the plain language of Section 618(f), because while Congress said board proceedings "may not be disclosed," it did not say board proceedings may not be disclosed in civil discovery. *See CFGC*, 217 F.R.D. at 260 ("section 618(f) does not contain specific language barring discovery"). The Supreme Court has repeatedly rejected such an approach to statutory construction as a general matter. *See, e.g., PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001) (" 'the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.' ") (quoting *Pennsylvania Dep't of*

Corrections v. Yeskey, 524 U.S. 206, 212 (1998) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985))); accord *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003) ("[T]he Supreme Court has consistently instructed that statutes written in broad, sweeping language should be given broad, sweeping application."). The district court relied for the opposite approach upon our cases stating that "general statutory bans on publication do not bar limited disclosure in judicial proceedings, including court-supervised discovery," *Laxalt v. McClatchy*, 809 F.2d 885, 889 (D.C. Cir. 1987), and noting that "where Congress thought it necessary to protect against court use of records it has expressly so provided by specific language." *Freeman v. Seligson*, 405 F.2d 1326, 1351 (D.C. Cir. 1968); *see also Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1343 (D.C. Cir. 1984) (quoting *Freeman*).

The district court seriously overread those precedents. In *Laxalt*, for example, we held that the Privacy Act did not prohibit disclosure of protected material in discovery, but the provision in question expressly *permitted* disclosure "pursuant to the order of a court of competent jurisdiction." 5 U.S.C. § 552a(b)(11) (1982); *see Laxalt*, 809 F.2d at 887 n.7. We specifically noted that fact in concluding that the Privacy Act did not trump the normal discovery rules. *See Laxalt*, 809 F.2d at 889. This holding is hardly precedent for overriding a categorical *prohibition* on disclosure of the sort at issue here.

Friedman and *Freeman* considered different versions and clauses of Section 8(a) of the Commodities Exchange Act (CEA), governing investigative files of the Secretary of Agriculture and, later, the Commodity Futures Trading Commission (CFTC). In each case, we ruled that the provision in question did not bar civil discovery. In *Friedman*, however, the clause simply provided that the CFTC "*may* withhold from public disclosure any data or information concerning or obtained in connection with any pending investigation of any person." 7 U.S.C. § 12(a) (emphasis added). "May withhold" is not tantamount to "may not be disclosed."

In *Freeman*, the clause at issue provided that the Secretary of Agriculture "may publish" the results of investigations and statistical information of interest to the public, "except data and information which would separately disclose the business transactions of any person and trade secrets or names of customers." *See* 405 F.2d at 1340-41 (emphasis omitted; quoting statute). The majority held that disclosure in civil discovery was not "publishing" of the sort prohibited by this language; Congress was concerned with "widespread dissemination of information not otherwise available to the public, and not with disclosure in judicial proceedings." *Id.* at 1349. Here, Section 618(f) does not merely prohibit "publication," it categorically bars mere *disclosure* to anyone not a member of the promotion selection board.[2]

4. In *Baldridge*, the Court noted that a conclusion that a statutory privilege exists "shields the requested information from disclosure despite the need demonstrated by the

---

[2]As the district court recognized, see *CFGC*, 217 F.R.D. at 258 n. 9, *St. Regis Paper* is even further afield. The provision of The Census Act at issue in that case precluded disclosure by government officials of certain information; the question was whether that provision should be construed to protect private entities from turning over the same information in response to civil discover. *St. Regis Paper*, 386 U.S. at 215-7. The Court's statement that it should "avoid a construction that would suppress otherwise competent evidence unless the statute, strictly construed, requires such a result," *id.* at 218, was made in the course of rejecting an argument for expanding the reach of a statutory privilege beyond its terms. The Court declined to do so, noting that "we cannot rewrite the Census Act."

The Chaplains also seek support for their clear statement rule from *Webster v. Doe*, 486 U.S. 592, 603 (1988) ("where Congress intends to preclude judicial review of judicial claims, its intent to do so must be clear"). Section 618(f), however, does not preclude judicial review of the Chaplains' claims, and the government has not argued that it does. As the government recognizes, "plaintiffs here remain free to litigate their discrimination claims and to support them with evidence." Reply Br. at 4.

litigant." 455 U.S. at 362; *see id.* at 360 ("If a privilege exists, information may be withheld, even if relevant to the lawsuit and essential to the establishment of a plaintiff's claim."). As the Supreme Court reiterated this past Term:

> Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding. It results from "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill."

Lamie, 124 S. Ct. at 1032 (quoting *United States v. Locke*, 471 U.S. 84, 95 (1985)). As in *Baldridge*, we accordingly apply the bar on disclosure as written, and conclude that it applies to block civil discovery of promotion selection board proceedings in civil litigation.

5. Section 618(f) applies to "proceedings of a selection board convened *under section 611(a)* of this title." 10 U.S.C. § 618(f) (emphasis added). Section 611(a) provides authorization to convene "selection boards to recommend for promotion," while Section 611(b) provides authorization to convene the other statutory selection boards -- continuation on active duty and selective early retirement -- governed by Sections 637 and 638 respectively. 10 U.S.C. § 611(a), (b). There is no provision similar to Section 618(f) -- barring disclosure of board proceedings -- in Sections 637 and 638. 10 U.S.C. §§ 637, 638.

The plaintiffs' motion to compel was titled "Motion for an Order Requiring Defendant Secretary of the Navy to Release Personnel Associated with Chaplain Promotion Boards from their Oath Not to Disclose Promotion Board Proceedings." Although the title mentioned only promotion boards, the plaintiffs requested the court to compel the Secretary to release all members of "promotion, selective early retirement ('SER') and other statutory boards" from their oath of non- disclosure. Mem. in Support of Pls.' Mot. at 2. The plaintiffs used the term "selection board" throughout the

motion to refer collectively to all types of selection boards. *See id.* at 7, 9; *see also id.* at 7 (citing to the complaint for allegations of impropriety in the selective early retirement process).

The Navy understood the plaintiffs to be seeking disclosure of promotion boards and selective early retirement boards. Defs.' Opp. to Pls.' Mot. at 5 n.3. Throughout the opposition, the Navy used the term "selection board" and did not distinguish among the different types of boards. *See id.* at 2, 6, 16, 17. The Navy argued that the district court should deny "discovery into the deliberations of Chaplain Corps promotion and selective early retirement ('SER') boards" because "10 U.S.C. § 618(f) absolutely bars disclosure of the Navy's selection board proceedings." *Id.* at 1. The district court also treated the plaintiffs' motion as seeking disclosure of all selection boards. *CFGC*, 217 F.R.D. at 254 n.4. Without distinguishing between the various boards, *see id.* at 258-60, the district court granted the plaintiffs' motion, holding that "section 618(f) does not create an absolute or qualified privilege barring discovery of selection-board proceedings." *Id.* at 260.

On appeal, neither of the parties distinguished between the different types of selection boards. The plaintiffs referred collectively to "selection boards," *see* Appellees' Br. at 37, 46, and also discussed both promotion selection boards, *see id.* at 40, 44, and selective early retirement boards, *id.* at 45, in their arguments against the existence of a statutory bar. The plaintiffs never argued that Section 618(f) by its terms did not apply to continuation on active duty or selective early retirement boards. The Navy similarly treated the selection boards collectively, arguing on appeal that Section 618(f) barred disclosure of both promotion and selective early retirement boards. Appellants' Br. at 17, 19-21.

We are frankly a bit surprised that throughout this dispute about whether a one-sentence statutory provision barred disclosure of selection board proceedings, neither party

pointed out that the statute, by its terms, applied only to certain types of selection board proceedings. This calls to mind what Judge Friendly described as Felix Frankfurter's "threefold imperative to law students" in his landmark statutory interpretation course: "(1) Read the statute; (2) read the statute; (3) read the statute!" Henry J. Friendly, *Benchmarks* 202 (1967). In any event, in reversing the district court's decision with respect to promotion selection boards, we do not decide whether proceedings of other statutory selection boards are discoverable. Neither the district court nor the parties addressed that as a distinct question, and analysis of it may turn in part on a proper understanding of Section 618(f). We accordingly vacate the district court's decision with respect to continuation on active duty and selective early retirement selection boards, and remand for further consideration. The parties should be afforded the opportunity to litigate, and the district court in the first instance to decide, whether continuation on active duty and selective early retirement board proceedings are protected, and to what extent, in light of our decision on the proper reading of Section 618(f).

IV. The Chaplains' Pendent Claims

In their brief, the Chaplains present two additional issues, arguing that the district court erred in rejecting their claims that (1) Navy chaplains should be considered clergy, not naval officers, for the purpose of evaluating their constitutional claims, and (2) allowing Navy chaplains to sit on promotion boards violates the Establishment Clause of the First Amendment. *See* Appellees' Br. at 46, 52-55. Recognizing that these issues are not presently appealable by themselves, the Chaplains nonetheless urge this court to exercise pendent appellate jurisdiction to review them now.

"This court does not exercise pendent appellate jurisdiction frequently or liberally." *National R.R. Passenger Corp. v. Expresstrak*, 330 F.3d 523, 527 (D.C. Cir. 2003). Such

jurisdiction may be appropriate only when (1) a "nonappealable order is 'inextricably intertwined' with the appealable order," or (2) review of the nonappealable order is " 'necessary to ensure meaningful review' " of the appealable order. *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 679 (D.C. Cir. 1996) (quoting *Swint v. Chambers County Comm'n*, 514 U.S. at 51). No such considerations are present in this case. The Chaplains' constitutional claims -- not even presented on a cross-appeal -- are not intertwined with, nor necessary to ensure meaningful review of, the statutory privilege issue that is within our jurisdiction. We accordingly decline to consider them.

* * *

We reverse the district court's decision with respect to promotion selection boards, vacate the district court's decision with respect to continuation on active duty and selective early retirement selection boards, and remand for further proceedings consistent with this opinion. The petition for mandamus is dismissed as moot.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-533 **September Term, 2004**

Filed On: September 21, 2004

[849249]

Chaplaincy of Full Gospel Churches, et al.,
Appellees,

v.

Gordon R. England, Secretary of the U.S. Navy, et al.,
Appellants

BEFORE: Ginsburg, Chief Judge, and Edwards Henderson, Randolph, Rogers, Tatel, Garland, and Roberts, Circuit Judges

ORDER

Upon consideration of appellees' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-533 **September Term, 2004**
Filed On: October 4, 2004
[852610]

Chaplaincy of Full Gospel Churches, et al.,
Appellees,

v.

Gordon R. England, Secretary of the U.S. Navy, et al.,
Appellants

consolidated with 03-5334

ORDER

It is **ORDERED** on the court's own motion, that the order issued September 21, 2004 be amended to include the consolidated case No. 03-5334.

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Michael C. McGrail
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAPLAINCY OF FULL GOSPEL CHURCHES, *et al.*,	:
Plaintiffs,	:
v.	: Civil Action No.: 99-2945 (RMU)
HANSFORD JOHNSON, Acting Secretary of the Navy, *et al.*,	: Document Nos.: 125, 129, 134, 135
Defendants	: 137, 150

ROBERT H. ADAIR *et al.*,	**FILED** SEP 2 - 2003 Nancy Mayer Whittington, Clerk U.S. District Court
Plaintiffs,	
v.	: Civil Action No: 00-0566 (RMU)
HANSFORD T. JOHNSON, Acting Secretary of the Navy, *et al.*,	
Defendants.	

MEMORANDUM OPINION

GRANTING THE PLAINTIFFS' MOTION TO COMPEL; DENYING OTHER PENDING DISCOVERY MOTIONS; AND DIRECTING THE PARTIES TO SUBMIT A REVISED JOINT STATUS REPORT

I. INTRODUCTION

This matter comes before the court on the plaintiffs'

motion to compel the testimony of Navy chaplain selection-board personnel. The plaintiffs, current and former Navy chaplains, bring this suit against the Secretary, other Navy officials, and the Navy alleging that the Navy's policies and practices - including the selection-board process - favor liturgical Christians over non-liturgical Christians in violation of the First and Fifth Amendments to the Constitution. The plaintiffs now wish to depose former members of chaplain selection boards. The defendants contend that the requested testimony is not relevant and assert the deliberative-process privilege as well as an absolute or qualified statutory privilege. Because the requested testimony is relevant, the deliberative-process privilege does not apply, and no statutory privilege exists, the court grants the plaintiffs' motion. The court also denies other pending discovery motions and directs the parties to submit a revised joint status report.

II. BACKGROUND[1]

The plaintiffs in this case allege that the Navy has established, promoted, and maintained religious quotas and other discriminatory practices in the Navy Chaplain Corps in violation of the First and Fifth Amendments. Second Am. Compl. at 2. According to the plaintiffs, until the 1980s, the Navy hired chaplains from various faith groups based on objective criteria, such as the relative percentage a religion represented in the total American population. *Id.* at 23-24. In

---

[1]The plaintiffs in both this action and the related case of *Adair v. Johnson* allege that the Navy has established and maintained an unconstitutional religious quota system for promotion, assignments, and retention of Navy chaplains, in violation of the First and Fifth Amendments. *Adair* Second Am. Compl.; *Chaplaincy* Second Am. Compl. Pursuant to the parties' joint recommendation, the court consolidated the two cases for pretrial purposes. Order dated Sept. 26, 2000. Because the plaintiffs filed their motion to compel in the *Chaplaincy* case, however, the court draws the factual history from the *Chaplaincy* complaint. For a more detailed discussion of the factual backgrounds of both cases, *see Adair v. England*, 183 F. Supp. 2d 31 (D.D.C. 2002) and *Chaplaincy of Full Gospel Churches v. Danzig*, No. 99-2945, slip op. at 2-7 (Aug. 17, 2000).

response to a shift in America's religious demographics away from liturgical Protestant denominations and toward non-liturgical Christian faith groups, however, the Navy allegedly abandoned its objective criteria and adopted a subjective "thirds policy." *Id.* at 24. Under the thirds policy, the Navy allegedly reserved one-third of its Chaplain Corps slots for Catholics, one-third for liturgical Protestants, and one-third for members of all other religions (including non-liturgical Christians). *Id.*

According to the plaintiffs, the Navy applied the thirds policy not only to accessions,[2] but to promotions and retentions. *Id.* at 25. To identify officers for promotion and early retirement, the Navy uses selection boards that evaluate a chaplain's capacity and potential for further service. *Id.* at 28, 30 (citing 10 U.S.C. §§ 612 *et seq.*). The plaintiffs allege that to maintain liturgical control of the Chaplain Corps, the Navy uses the promotion and early retirement selection boards to diminish non-liturgical chaplains' opportunity for promotion and to "thin down" the number of non-liturgical chaplains at the higher ranks by forcing them out of service. *Id.* at 24, 28, 32-33. In support of their allegations, the plaintiffs set forth various statistics and anecdotal evidence. *E.g.*, *id.* at 4-9, 14-17, 19-20, Exs. 2-4, 6. The plaintiffs also point to a 1995 report ("the Ellis Report") noting a "clear" and "disconcerting" institutional bias against non-liturgical chaplains in key Navy positions and a 1997 report ("the Stafford Report") indicating that one promotion board "may have systematically applied a denominational quota system, perhaps to ensure balanced denominational representation across the Chaplain Corps." *Id.* at 26-27, 32, Exs. 5, 8.

The plaintiffs filed their complaint in November 1999.

---

[2]The term "accessions" refers to individuals the Chaplain Corps brings into the Navy, either active duty or reserve, as commissioned officers during the current fiscal year. *Adair v. England*, 217 F. Supp. 2d 7, 9 n.5 (D.D.C. 2002) (quoting the Defendants' submission).

Two years later, in January 2001, the court's Calendar Committee transferred this case and the related case of *Adair v. Johnson*, Civil Action No. 00-0566, to this member of the court. On January 10, 2002, the court issued a comprehensive memorandum opinion granting in part and denying in part the defendants' motion to dismiss both consolidated cases. *Adair v. England*, 183 F. Supp. 2d 31 (D.D.C. 2002). The court concluded, *inter alia*, that the plaintiffs had successfully stated a claim that the defendants' policies and practices violated the Constitution.[3] *Id.*

On October 29, 2002, the plaintiffs filed their motion to compel the testimony of Navy chaplain selection-board personnel.[4] They contend that the testimony of selection-board personnel is material to their claims, but that the Navy has refused to allow such personnel to testify on the grounds that the proceedings of a selection board "may not be disclosed to any person not a member of the board." Pls.' Mot. to Compel ("Pls.' Mot.") at 1 (citing 10 U.S.C. §§ 618(f)). On May 1, 2003,

---

[3]Since then, the court has issued rulings on several additional motions. *E.g.*, *Chaplaincy of Full Gospel Churches v. Johnson*, 276 F. Supp. 2d 82, 2003 U.S. Dist. LEXIS 13984, 2003 WL 21940397 (D.D.C. Aug. 14, 2003); *Chaplaincy of Full Gospel Churches v. Johnson*, 276 F. Supp. 2d 79, 2003 U.S. Dist. LEXIS 13280, 2003 WL 21783173 (D.D.C. Aug. 4, 2003); *Adair v. Johnson*, 216 F.R.D. 183; 2003 U.S. Dist. LEXIS 11930, 2003 WL 21659610 (D.D.C. 2003); *Adair v. England*, 217 F. Supp. 2d 7 (D.D.C. 2002); *Adair v. England*, 209 F.R.D. 5 (D.D.C. 2002); *Adair v. England*, 209 F.R.D. 1 (D.D.C. 2002); *Adair v. England*, 217 F. Supp. 2d 1 (D.D.C. 2002); *Adair v. England*, 193 F. Supp. 2d 196 (D.D.C. 2002).

[4]Although the title of the plaintiffs' motion refers only to chaplain promotion boards, the text of the motion refers to chaplain selection boards generally. Pls.' Mot. at 1 (referring to the need for the testimony of those associated with "chaplain selection boards"), 2 (requesting the release of those associated with "chaplain selection boards . . including promotion, selective early retirement . . . and other statutory boards"). Like the defendants, the court therefore assumes that the plaintiffs seek discovery of all chaplain selection boards. Defs.' Opp'n at 2 n.3.

the plaintiffs filed a motion asking the court to find that the defendants have waived their opposition to the plaintiffs' motion to compel, or, in the alternative, to allow them to file their waiver motion as a supplemental pleading. [5] Pls.' Waiver Mot. The plaintiffs also filed a motion to alter the limits for the number of depositions and interrogatories, motions to refer the motion to alter and future discovery motions to a magistrate judge, and a motion to vacate existing discovery dates. The court turns first to the plaintiffs' motion to compel, and then to the remaining discovery motions.

III. ANALYSIS

A. Legal Standard for a Motion to Compel[6]

Under Federal Rule of Civil Procedure 37(a), a party may move the court in which the action is pending for an order compelling disclosure. FED. R. CIV. P. 37(a). The party must certify that the movant has conferred in good faith with the party refusing disclosure in an effort to avoid court action. *Id.* If the court grants the motion to compel, the court "shall, after affording an opportunity to be heard, require the party . . . whose conduct necessitated the motion . . . to pay to the

---

[5]The plaintiffs style their motion as a "Notice of Defendant's [*sic*]Waiver of Opposition to Plaintiffs' Motion for an Order Compelling the Secretary of the Navy to Release Board Personnel from Their Oath of Secrecy or in the Alterative a Motion to File a Supplemental Pleading." Pls.' Waiver Mot. at 1.

[6] In this case, although the plaintiffs do not style their motion as a motion to compel, everything about their motion is characteristic of a Rule 37 motion to compel. FED. R. CIV. P. 37(a). Specifically, the plaintiffs seek to compel certain disclosures by the defendants. Pls.' Mot. at 1; *accord* FED. R. CIV. P. 37(a)(2). In addition, following Rule 37 procedures, the plaintiffs "have requested on several occasions that the Secretary release board members from their oath [and the] Navy has refused, necessitating this motion." Pls.' Mot. at 1-2; *accord* FED. R. CIV. P. 37(a)(2). Accordingly, the defendants view the motion as a Rule 37 motion to compel, and the court joins them in that view. *E.g.*, Defs.' Opp'n at 32 & Ex. H.

moving party the reasonable expenses incurred in making the motion, including attorney's fees." *Id.* 37(a)(4); *see also* Standing Order ¶ 9. This award of expenses is intended to "deter the abuse implicit in carrying or forcing a discovery dispute to court when no genuine dispute exists." *Cobell v. Norton* ("*Cobell I*"), 213 F.R.D. 16, 29 (D.D.C. 2003) (quoting FED. R. CIV. P. 37(a)(4) advisory committee's note).

A court may not award Rule 37 expenses, however, if it finds, *inter alia*, that "the opposing party's nondisclosure, response, or objection was substantially justified." FED. R. CIV. P. 37(a)(4). An opposing party's objection qualifies as "substantially justified" if "there is a genuine dispute or if reasonable people could differ as to the appropriateness of the contested action." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *Cobell v. Norton* ("*Cobell II*"), 213 F.R.D. 48, 61 (D.D.C. 2003); *see also* 8A FED. PRAC. & PROC. § 2288 (stating that an objection to a motion is substantially justified "if the motion raised an issue about which reasonable people could genuinely differ on whether a party was bound to comply with a discovery rule"); *accord Pub. Citizen Health Research Group v. Young*, 909 F.2d 546, 552 (D.C. Cir. 1990) (stating, in the context of the Equal Access to Justice Act, that the question "is whether there was a reasonable basis in fact and law for the government's litigating position").

A trial court enjoys broad discretion in choosing a sanction under Rule 37. *Sturgis v. Am. Ass'n of Retired Persons*,1993 WL 518447, at *1 (D.C. Cir. 1993) (per curiam). That said, "the central requirement of Rule 37 is that any sanction must be just." *Bonds v. District of Columbia*, 93 F.3d 801, 808 (D.C. Cir. 1996).

B. The Parties' Arguments

The defendants advance three arguments in opposition to the plaintiffs' motion to compel. First, the defendants argue that the testimony the plaintiffs seek is not relevant in light of

the statistical evidence before the court, and thus is not discoverable under Federal Rule of Civil Procedure 26(b). Defs.' Opp'n at 5-16 (citing FED. R. CIV. P. 26(b)(1)). Second, the defendants contend that even if the requested testimony is relevant, it is absolutely protected from disclosure pursuant to 10 U.S.C. § 618(f), the statute barring disclosure of selection-board deliberations. *Id.* at 16-19. Finally, the defendants state that even if section 618(f) does not act as an absolute bar to discovery, the requested testimony is protected by a qualified statutory privilege or the deliberative-process privilege because the government's interest in maintaining confidentiality of board deliberations far outweighs the plaintiffs' need for the requested testimony. *Id.* at 19-31.

The plaintiffs counter each of these arguments. Marshaling statistical evidence of their own, the plaintiffs assert that the testimony they seek is relevant under Rule 26(b). Pls.' Reply at 2-10. Moreover, according to the plaintiffs, section 618(f) does not serve as an absolute bar to disclosure for purposes of discovery. Pls.' Mot. at 8-9; Pls.' Reply at 11-13. Nor, in the plaintiffs' view, does a qualified statutory privilege apply, as the plaintiffs' need for the testimony outweighs any countervailing factors. Pls.' Mot. at 16-19. As for the deliberative-process privilege, the plaintiffs state that it cannot apply because the integrity of the deliberative process here - the Navy chaplain selection boards - is squarely at issue. Pls.' Mot. at 5-8.

C. The Court Concludes That the Requested Testimony Is Relevant

1. Relevance Under Federal Rule of Civil Procedure 26(b)(1)

Rule 26(b)(1) authorizes discovery "regarding any matter, not privileged, that is relevant to the claim or defense of any party." FED. R. CIV. P. 26(b)(1). The term "relevance" is broadly construed, and "relevant information need not be

admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*; *Food Lion, Inc. v. United Food & Comm'l Workers Int'l Union*, 103 F.3d 1007, 1012 (D.C. Cir. 1997); *see also Smith v. Schlesinger*, 513 F.2d 462, 473 n.37 (D.C. Cir. 1975) (noting that "a party may discover information which is not admissible at trial if such information will have some probable effect on the organization and presentation of the moving party's case"). Put another way, "[a] showing of relevance can be viewed as a showing of need[, as] for the purpose of prosecuting or defending a specific pending civil action, one is presumed to have no need of matter not relevant to the subject matter involved in the pending action." *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984). That said, relevancy does not encompass discovery of information with "no conceivable bearing on the case." *Id.* (citing 8 FED. PRAC. & PROC.2d § 2008). A trial court enjoys considerable discretion over discovery matters. *Id.*; *United States v. Krizek*, 192 F.3d 1024, 1029 (D.C. Cir. 1999).

2. The Testimony of Selection-Board Personnel Is Relevant Under Rule 26(b)(1)

The plaintiffs seek to obtain testimony from former selection-board personnel with first-hand knowledge of various board deliberations. Pls.' Mot. at 1-2 & Exs. 4-5. Both here and in the *Adair* case the plaintiffs claim that the Navy has established, promoted, and maintained religious quotas and other discriminatory practices favoring liturgical Christian chaplains over non-liturgical chaplains in violation of the First and Fifth Amendments. *See generally* Second Am. Compl.; *Adair* Second Am. Compl. Throughout this litigation, the plaintiffs repeatedly have cited the selection-board process as a prime example of the Navy's allegedly discriminatory practices. *E.g.*, Second Am. Compl. at 27-28, 30-32; *see also, e.g.*, *Chaplaincy of Full Gospel Churches v. Johnson*, 2003 WL 21940397, at *1 (D.D.C. Aug. 14, 2003); *Adair v. Johnson*, 216 F.R.D. 183, 2003 WL 21659610, at *3 (D.D.C. July 15, 2003);

Adair v. England, 217 F. Supp. 2d 7, 9-10 (D.D.C. 2002); *Adair v. England*, 209 F.R.D. 5, 10 (D.D.C. 2002); *Adair v. England*, 183 F. Supp. 2d 31, 42 (D.D.C. 2002). It is hard to argue that the testimony of former selection-board personnel with direct knowledge of board proceedings is not "relevant" and "reasonably calculated to lead to the discovery of admissible evidence" regarding alleged Navy discrimination against non-liturgical chaplains in those very proceedings. FED. R. CIV. P. 26(b)(1); *Food Lion*, 103 F.3d at 1012; *accord Alexander v. Fed. Bureau of Investigation*, 186 F.R.D. 170, 174 (D.D.C. 1999) ("*Alexander I*") (granting the "Filegate" plaintiffs' motion to compel testimony because their proposed questions were reasonably calculated to lead to the discovery of a White House connection to the release of Linda Tripp's security information).

The defendants, however, attempt to argue the point. Specifically, the defendants contend that "anecdotal evidence" of board proceedings cannot prove the plaintiffs' allegations of religious bias, and thus that the requested testimony cannot be relevant. Defs.' Opp'n at 13-14 (listing cases holding that anecdotal evidence is insufficient to prove a pattern or practice of discrimination). But this logic would turn Rule 26 on its head by requiring the plaintiffs to prove their claim before permitting them to seek discovery. Although the defendants may believe that the plaintiffs' evidence is insufficient to support their claims, "discovery is not to be denied because it relates to a claim or defense that is being challenged as insufficient." 8 FED. PRAC. & PROC. C.2d § 2008. Accordingly, the court concludes that the plaintiffs' requested testimony is relevant within the meaning of Rule 26(b)(1). FED. R. CIV. P. 26(b)(1); *Food Lion*, 103 F.3d at 1012.

D. The Court Concludes that the Government-Misconduct Exception Bars Application of the Deliberative-Process Privilege

1. The Deliberative-Process Privilege

The general purpose of the deliberative-process privilege is to "prevent injury to the quality of agency decisions." *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). The three policy objectives underlying the privilege are (1) to encourage creative and candid discussions within an agency and thereby improve the quality of agency policy decisions; (2) to protect against premature disclosure of proposed policies before final adoption, and (3) to protect the integrity of the decision-making process by ensuring that officials are judged by their final decision, rather than for matters considered beforehand. *Jordan v. Dep't Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978). Toward that end, the privilege protects "documents and other materials that would reveal advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated." *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997) (quoting *Sears*, 421 U.S. at 150). Accordingly, for the privilege to apply, the government must show that the material is both predecisional and deliberative. *Id.*

Because the deliberative-process privilege is a qualified privilege, it may be overcome by a sufficient showing of need by the party seeking discovery. *Id.* Once the government has asserted the privilege, the court must balance the party's need against the harm that may result from disclosure, taking into account the relevance of the evidence, the availability of other evidence, the seriousness of the litigation and the issues involved, the role of the government in the litigation, and the possibility of future timidity by government employees. *Id.* at 737-38; *First E. Corp. v. Mainwaring*, 21 F.3d 465, 468 n.5 (D.C. Cir. 1994).

When there is any reason to believe that government misconduct has occurred, however, our court of appeals has made clear that the deliberative-process privilege disappears altogether. *In re Sealed Case*, 121 F.3d at 746; *In re Subpoena Duces Tecum Served on the Office of the Comptroller of the*

Currency, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (noting that "if the plaintiff's cause of action is directed at the government's intent . . . it makes no sense to permit the government to use the privilege as a shield"); *see also Waters v. U.S. Capitol Police Bd.*, 2003 WL 21004636, at *9 (D.D.C. May 6, 2003) (stating that "it is inconceivable" that Congress intended the deliberative-process privilege to apply to information bearing on whether an agency engaged in discrimination); *Dominion Cogen D.C., Inc. v. District of Columbia*, 878 F. Supp. 258, 268 (D.D.C. 1995) (finding that the privilege does not apply where the plaintiff's allegations "place the deliberative process itself directly in issue"). Under this government-misconduct exception, the court does not engage in the usual balancing test, but simply concludes that the privilege does not "enter the picture at all." *In re Subpoena Duces Tecum*, 145 F.3d at 1425; *see also Alexander I*, 186 F.R.D. at 177 (rejecting as "incorrect" the government's argument that the balancing test applies in the face of identifiable government misconduct). To invoke the government-misconduct exception, the party seeking discovery must provide an adequate factual basis for believing that the requested discovery would shed light upon government misconduct. *Judicial Watch of Fla. v. Dep't of Justice*, 102 F. Supp. 2d 6, 15-16 (D.D.C. 2000); *Alexander v. Fed. Bureau of Investigation*, 186 F.R.D. 154, 164 (D.D.C. 1999) ("*Alexander II*").

2. The Plaintiffs Have Provided an Adequate Factual Basis for Their Belief Regarding Government Misconduct

The defendants argue that the deliberative-process privilege protects the requested testimony because selection-board proceedings are both predecisional and deliberative. Defs.' Mot. at 20-21. Moreover, the defendants assert that the government-misconduct exception does not apply because the plaintiffs have provided no "reason to believe" that the requested testimony would shed light on alleged Navy

discrimination against non-liturgical chaplains.[7] *Id.* at 22. Specifically, the defendants contend that the plaintiffs' statistics "bear out no systemic discrimination against non-liturgicals as a class." *Id.* The plaintiffs dispute the defendants' arguments, and point to evidence that they believe demonstrates the Navy's misconduct. The plaintiffs cite to the Stafford Report, along with a 1999 report by the inspector general of the Department of Defense ("DoD IG report") and a 1998 investigation by the inspector general of the Navy ("Navy IG report"), all of which the plaintiffs say raise questions about the impartiality of the chaplain selection boards. Pls.' Mot. at 6, 10-13 & Ex. 2; Pls.' Reply at 3. The plaintiffs also cite to various statistics that they believe demonstrate the application of the thirds policy to chaplain promotions. Pls.' Mot. at 13-16 & Exs. 9-10.

Without addressing the merits of the plaintiffs' claims, the court concludes that the plaintiffs have provided an adequate factual basis for their belief that the requested testimony will provide evidence of government misconduct. *Alexander II*, 186 F.R.D. at 165. The various reports and statistics cited by the plaintiffs are adequate at this stage to support a belief that the Navy engaged in discrimination against non-liturgical chaplains.[8] *Id.* (finding that the inclusion

---

[7]As an aside, the defendants take issue with the plaintiffs' characterization of government misconduct as an automatic exception to the deliberative-process privilege. Defs.' Mot. at 22 n.9 (adopting the position of the government defendants in *Alexander I*, 186 F.R.D. at 177). The defendants suggest that "the proper analysis of the deliberative process privilege would involve the court's consideration of government misconduct as a factor in balancing of the interests, but not as an automatic exception to application of the deliberative process privilege." *Id.* In light of the clear statements by our court of appeals, however, this court agrees with Judge Lamberth's conclusion that the defendants' suggestion is "simply incorrect." *Alexander I*, 186 F.R.D. at 178.

[8]The court's conclusion that the plaintiffs' statistics provide an adequate basis for a belief in Navy misconduct does not pass judgment on the relative strengths of the parties' statistics. *Alexander II*, 186 F.R.D. at 164-

of certain misinformation in draft responses to members of Congress about Filegate provided an adequate basis to believe that government misconduct had occurred); *cf. Judicial Watch*, 102 F. Supp. 2d at 15-16 (holding that the plaintiff's bare and unsupported allegation of misconduct by the Attorney General did not provide an adequate basis to believe that discovery would shed light on government misconduct). Because the plaintiffs have adequately provided a reason to believe that Navy misconduct has occurred, the deliberative-process privilege disappears and cannot prevent discovery of the requested testimony. *In re Subpoena Duces Tecum*, 145 F.3d at 1424; *In re Sealed Case*, 121 F.3d at 746.

E. The Court Concludes that Section 618(f) Does Not Bar Limited Discovery

1. Statutory Bans on Publication[9]

"It is well-settled in this circuit that general statutory

---

65 (distinguishing between proving misconduct and providing a basis for a belief in misconduct). The court is acutely aware of the disagreements between the parties over the use and accuracy of statistical data regarding, *inter alia*, Navy chaplain accessions and promotions. *E.g.*, *Adair*, 217 F. Supp. 2d at 15. In fact, toward that end, the court has stressed that "a thorough discovery period will greatly assist the court in evaluating the merits of the parties' claims." *Id.*

[9]In their analysis, the parties cite to *St. Regis* and *Women in Science*, two cases that analyze statutes barring disclosure of confidential reports. Pls.' Mot. at 8 (citing *St. Regis Paper Co. v. United States*, 368 U.S. 208 (1962) and *Ass'n for Women in Science v. Califano*, 566 F.2d 339, 346 (D.C. Cir. 1977)); Defs.' Opp'n at 16-19 (same). In contrast to section 618(f), however, the statutes at issue in *St. Regis* and *Women in Science* focus on disclosure of confidential reports received from citizens. Defs.' Opp'n at 18; *St. Regis*, 368 U.S. at 295; *Women in Science*, 566 F.2d at 343, 346. Because the confidential-reports privilege is not at issue in this case, however, the court instead looks to authority addressing with statutes that bar the publication or disclosure of information. *E.g.*, *Laxalt v. McClatchy*, 258 U.S. App. D.C. 44, 809 F.2d 885, 887 n.7 (D.C. Cir. 1987) (examining Privacy Act proscriptions on disclosure of records).

bans on publication do not bar limited disclosure in judicial proceedings, including court-supervised discovery." *Laxalt v. McClatchy*, 258 U.S. App. D.C. 44, 809 F.2d 885, 889 (D.C. Cir. 1987). Two factors underlie this conclusion. First, full access by the courts and litigants to relevant information is "an important foundation for the achievement of justice by the courts in individual lawsuits." *Freeman v. Seligson*, 132 U.S. App. D.C. 56, 405 F.2d 1326, 1348 (D.C. Cir. 1968). Second, the purpose of statutory publication bans is not to prevent discovery, but rather to prevent the broadcasting of sensitive information to the general public. *Friedman*, 738 F.2d at 1343-44. Moreover, our court of appeals has declined to infer a qualified privilege from statutory publication bans, given that "where Congress has thought it necessary to protect against court use of records [it] has expressly so provided by specific language." *Id.* at 1343 (internal quotations omitted); *see also Laxalt*, 809 F.2d at 889 (stating that "we . . . refuse[] to infer the creation of a qualified privilege from congressional silence"). Instead, Congress "must clearly and strongly indicate its intent to contradict [the] broad objective favoring disclosure in judicial proceedings." *Friedman*, 738 F.2d at 1343 (internal quotations omitted).

Although statutory publication bans do not bar discovery, they are relevant in determining the appropriate scope and manner of discovery. *Laxalt*, 809 F.2d at 889. The interests protected by statutory publication bans "reflect a congressional judgment that certain delineated categories of documents may contain sensitive data which warrants a more considered and cautious treatment." *Id.* (quoting *Friedman*, 738 F.2d at 1344). Therefore, in exercising its supervision of discovery, a court "must accord the proper weight to the policies underlying these statutory protections, and compare them with the factors supporting discovery in a particular

lawsuit."[10] *Id.* A court then may use traditional devices - such as protective orders or *in camera* inspection - to shape a discovery plan that will give effect to liberal discovery rules without threatening the interests protected by statutory publication bans. *Id.* (noting that "the courts can limit . . . the persons having access to information, their freedom to discuss [that] information . . . and the uses to which the information may be put").

2. Section 618(f) Does Not Bar Limited Disclosure in Judicial Proceedings

As noted, the statute at issue here is section 618, which governs military board deliberations for active-duty service members, including chaplains. 10 U.S.C. § 618. Section 618(f) states that "except as authorized or required by this section, proceedings of a selection board convened under section 611(a) of this title may not be disclosed to any person not a member of the board." *Id.* To comply with section 618(f), all selection-board personnel take an oath swearing or affirming that they "will not divulge the proceedings of this board except as authorized or required by the Secretary of the Navy or higher authority." Pls.' Mot. Ex. 1.

The defendants assert that section 618(f) creates a blanket prohibition against disclosure (including discovery) of selection-board proceedings. Defs.' Opp'n at 16-17. Stressing

---

[10]One court has interpreted *Friedman's* "proper weight" analysis as requiring the classic balancing of confidentiality - vs. - need as a prerequisite to allowing discovery to proceed. *Gould, Inc. v. Mitsui Mining & Smelting Co., Ltd.*, 139 F.R.D. 244, 246 (D.D.C. 1991) (citing *Friedman*, 738 F.2d at 1344). A close reading of *Laxalt* reveals that the court's "proper weight" analysis serves not as a prerequisite to discovery, however, but simply as an aid to the court in determining how to exercise its traditional authority to limit disclosure. *Laxalt*, 809 F.2d at 889-90 (stating that "a test of necessity [is not] a *prerequisite* to initiating discovery of records" and that "the need to balance conflicting interests is entirely different from the proposition . . . that [records] are exempt . . . from civil discovery absent a specific showing of need" (emphasis in original)).

Congress' "clear direction that the deliberations of the boards be disclosed to no person not a member of the board," the defendants state that section 618(f) "addresses government information about the official conduct of military offices in a sensitive and important matter, and expressly protects that information to anyone, save the Secretary." *Id.* at 18-19. Alternatively, the defendants argue that section 618(f) creates a qualified privilege, and that the plaintiffs' need for the requested testimony does not outweigh the government's interest in preventing its disclosure. *Id.* at 19, 26. The plaintiffs dispute both arguments. First, the plaintiffs state that section 618(f) does not create an absolute bar to discovery. Pls.' Mot. at 8-9. Second, the plaintiffs contend that even if section 618(f) creates a qualified privilege, the court should extend the government-misconduct exception to section 618(f) and allow discovery. *Id.* at 9.

Following the directive of our court of appeals, the court looks to the plain language of section 618(f) to determine whether it creates an absolute or qualified privilege against discovery. *Laxalt*, 809 F.2d at 889; *Friedman*, 738 F.2d at 1343. Because section 618(f) does not contain specific language barring discovery, and because of the circuit's emphasis on providing litigants full access to relevant information, the court concludes that section 618(f) does not create an absolute or qualified privilege barring discovery of selection-board proceedings. *Id.* The court therefore grants the plaintiffs' motion to compel.

Remaining before the court, however, is the relevance of section 618(f) in determining the appropriate scope and manner of discovery. *Laxalt*, 809 F.2d at 889. Toward that end, the court must weigh the policies underlying section 618(f) against the factors supporting discovery here. *Id.*

Looking first to the policies underlying section 618(f), the court notes that the legislative history of section 618(f), although somewhat sparse, indicates that Congress enacted

the provision "to encourage candid discussions free from outside interference." S. REP. 102-482, at 2 (1992); *accord* Defs.' Opp'n Ex. H ("England Decl.") (stating that "free, uninhibited, and candid deliberations by selection boards are . . . vital to the effective functioning of the selection board process" and that "release of information regarding these proceedings to the public will severely undermine the [Navy's] ability to effectively operate its promotion and selective early retirement systems"). At the same time, the legislative history of the act that established section 618(f) as part of the selection-board process reveals Congress' steadfast interest in ensuring a uniform and merits-based selection system. *E.g.*, H.R. REP. 96-1462, at 3, 66-69 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6333 (describing the new uniform selection-board procedures of the 1980 Defense Officer Personnel Management Act). Congressional pronouncements since then have emphasized the need to maintain "the integrity of a selection system that provides all officers with a fair opportunity to be selected on merit" and to "keep the promotion system fair and free from manipulation." 133 CONG. REC. S10642-02 (daily ed. July 24, 1987) (statement of Sen. Nunn); *see also* S. REP. NO. 102-1, at 24 1991) (indicating that "the integrity of the promotion process is essential to the integrity of the officer corps"); S. REP. NO. 102-113 (1991) (stating that "[board] selections must be fair, impartial and based upon demonstrated potential instead of subjective criteria, and they must be seen as such by our officer corps"). Taken together, these actions indicate that Congress views section 618(f) as a means of promoting frank discussions among selection-board personnel, but does so in the context of ensuring the overall integrity of the armed forces selection system. *Laxalt*, 809 F.2d at 889.

Turning to the factors supporting discovery, the court notes that, given the confidentiality created by the oath, only selection-board personnel - the witnesses to the decision-making process - have direct knowledge of possible religious discrimination in the selection-board process. The defendants suggest that the plaintiffs instead pursue discovery regarding

the Navy's allegedly discriminatory intent by interviewing the Chaplain Corps leadership and regarding the Navy's bias by testing the accuracy of the defendants' promotion board statistics. Defs.' Opp'n at 30. But these alternatives do not constitute direct evidence, and this court has already indicated that it would defer until after discovery its decision as to how much of the plaintiffs' initial showing of a suggestion of denominational preference must be composed of statistical evidence. *Adair*, 217 F. Supp. 2d at 15 n.9.

Accordingly, the scope and manner of discovery in this case must take into account the defendants' interest in preventing a chill in selection-board discussions, the defendants' interest in maintaining integrity in selection-board proceedings, and the plaintiffs' interest in direct evidence of possible religious discrimination. *Laxalt*, 809 F.2d at 889. The court therefore exercises its supervisory authority to permit the plaintiffs to conduct limited discovery of selection-board personnel in a manner that is focused and that minimizes the possibility of harm to the selection-board process. *Id.* at 889-90. Rather than impose a discovery plan from above, however, the court directs the parties - who know their nature and extent of their interests far better than the court - to jointly propose a plan of discovery regarding the testimony of selection-board personnel.

Finally, because the court grants the plaintiffs' motion to compel, Rule 37(a)(4) directs the court to require the defendants to pay reasonable expenses unless the defendants' objection was "substantially justified." FED. R. CIV. P. 37(a)(4). In this case, the court concludes that the defendants' opposition to the plaintiffs' motion to compel was substantially justified because "reasonable people could differ" on whether the defendants, having asserted a deliberative-process or statutory privilege, were bound to comply with

discovery rules.[11] *Pierce*, 487 U.S. at 565; *accord In re Multi-Piece Rim Prods. Liability Litig.*, 653 F.2d 671, 680 (D.C. Cir. 1981) (affirming the district court's finding of substantial justification in part because of the subtlety of the legal issues presented). Accordingly, awarding reasonable expenses against the defendants would not be just and would not serve the rule's purpose of deterring unwarranted discovery objections. *Bonds*, 93 F.3d at 808; *Cobell I*, 213 F.R.D. at 29; FED. R. CIV. P. 37(a)(4) advisory committee's note.

F. The Court Denies Other Pending Discovery Motions and Directs the Parties to Submit a Revised Status Report

The court now turns to the plaintiffs' motion asking the court to find that the defendants have waived their opposition to the plaintiffs' motion to compel, or, in the alternative, to allow them to file their waiver motion as a supplemental pleading. In this waiver motion, the plaintiffs raise two concerns. First, the plaintiffs theorize that the defendants have waived any privilege by propounding an interrogatory that seems to direct the plaintiffs (including those plaintiffs who served as selection-board personnel) to divulge selection-board proceedings in violation of both section 618(f) and their oath. Pls.' Waiver Mot. at 2-11. Second, the plaintiffs state that as a result of the defendants' actions, they face a Hobson's choice of violating discovery rules or their oath. *Id.* at 10-11. In light of the court's decision today, the plaintiffs' motion is moot, and the court denies it as such.[12]

---

[11]The court also notes that the parties raised their disagreement regarding discovery of selection-board proceedings early on, giving the court ample advance notice of the existence and non-frivolous nature of the dispute. *E.g.*, Joint LCvR 16.3 Report dated Feb. 4, 2002.

[12]As an aside, the court notes that any Hobson's choice disappeared as soon as the plaintiffs consulted with the defendants. Prior to the filing of the motion, the defendants' counsel attempted both orally and in writing to clarify the disputed interrogatory. Defs.' Resp. at 4 & Ex. A. These communications from the defendants' counsel should have resolved any dilemma allegedly facing the plaintiffs as a result of the defendants'

As for the remaining discovery motions, the court denies without prejudice the plaintiffs' motion to alter the limits for the number of depositions and interrogatories, along with the plaintiffs' motions to refer that motion and future discovery motions to a magistrate judge.[13] The court also denies as moot the plaintiffs' motion to vacate the discovery dates set forth in the parties' October 1, 2002 joint status report.[14]

Accordingly, the court directs the parties to submit a revised joint status report that outlines not only the parties' plan of discovery regarding the testimony of selection-board personnel (as described in part III.E.2 *supra*), but proposes an amended discovery schedule that takes into account the parties' progress to date and the current posture of the case.[15] Because both parties have indicated an eagerness to move forward on discovery, the court expects the parties to actively continue working on discovery matters as they draft their amended schedule. *E.g.*, Defs.' Resp. to Pls.' Status Report & Mot. ("Defs.' Resp.") at 3 (stating that "defendants oppose an infinite, unending discovery timetable that gives plaintiffs no incentive whatsoever to diligently pursue discovery and bring this matter to a decision on the merits"); Pls.' Reply to Defs.' Resp. at 2 (stating that "delay [in discovery] only harms plaintiffs and helps the defendants").

---

interrogatory.

[13]On June 26, 2003, the court granted the parties' request to hold the plaintiffs' motion to alter in abeyance until the parties complied with the court's Standing Order. Order dated June 26, 2003.

[14]Although the court has not issued a formal schedule for discovery in this case, the parties established a discovery schedule as part of their court-ordered October 1, 2002 status report, and that schedule has guided the parties' efforts to date. Status Report dated Oct. 1, 2002.

[15]The court expects that in this effort, the parties will stipulate to reasonable alterations to the deposition and interrogatory limitations, and will resolve any outstanding issues regarding expert disclosures.

Finally, to keep this case on track, the court puts the parties on notice that it expects a maximum of cooperation and a minimum of filings from the parties. Toward that end, the court will henceforth strictly enforce its Standing Order and the federal and local discovery rules, imposing sanctions when warranted.

IV. CONCLUSION

For the foregoing reasons, the court grants the plaintiffs' motion to compel and denies other pending discovery motions. An order consistent with this Memorandum Opinion is separately and contemporaneously issued this 2nd day of September, 2003.

Ricardo M. Urbina

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT H. ADAIR, *et al.*	:
	:
Plaintiffs,	:
	:
v.	: Civil Action No.:
	: 00-0566 (RMU)
GORDON R. ENGLAND,	:
Secretary of the Navy, *et al.*,	: Document Nos.:
	: 5, 7, 8, 11, 19, 23
Defendants	:

CHAPLAINCY OF FULL	**FILED**
GOSPEL CHURCHES, *et al.*	: JAN 10 2002
	: Nancy Mayer
	: Whittington, Clerk
Plaintiffs,	: U.S. District Court
	:
v.	:
	: Civil Action No:
HANSFORD T. JOHNSON,	: 99-2945 (RMU)
Acting Secretary of the Navy, *et al.*,	: Document Nos.:
	: 25, 42
Defendants.	:

MEMORANDUM OPINION

DENYING IN PART AND GRANTING IN PART THE DEFENDANTS' MOTION TO DISMISS; DENYING AS MOOT THE DEFENDANTS' MOTION TO HOLD THE PROCEEDINGS IN ABEYANCE; DENYING WITHOUT PREJUDICE THE PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; DENYING WITHOUT PREJUDICE THE PLAINTIFFS' MOTION TO ALLOW A CHAPLAIN PLAINTIFF TO USE A PSEUDONYM

I. INTRODUCTION

These cases incite a probing scrutiny of the First Amendment's Establishment and Free Exercise Clauses. While the vast majority of First Amendment religion cases involve laws or governmental policies that allegedly promote or inhibit religion in relation to the secular realm (e.g., school-voucher cases, prayer-in-school cases), the instant cases implicate the more unusual claim that governmental policies favor one religion over another.

Although the above-captioned cases are not consolidated for all purposes, they have been consolidated for purposes of the pending motions.[1] In the *Chaplaincy* case, the plaintiffs are an endorsing agency for military chaplains and seven of its individual members. In the *Adair* case, the plaintiffs are 17 current and former non-liturgical chaplains in the Department of the Navy ("the defendants", "Navy", or "DON"). In both cases, the plaintiffs allege that the Navy has established and maintained an unconstitutional religious quota system for promotion, assignments, and retention of Navy chaplains, in violation of both the Establishment Clause and the Free Exercise Clause of the First Amendment, and the Equal Protection Clause of the Fifth Amendment. Specifically, the plaintiffs allege that the Navy's policies and practices favor liturgical Christian chaplains over non-liturgical Christian chaplains.

The principal motion before the court is the defendants' motion to dismiss the complaint in the *Adair* case.

---

[1] In January 2001, the court's Calendar Committee transferred both of these cases from Judge June Green to this member of the court. In an order dated September 26, 2000, Judge Green accepted the parties' joint recommendation and consolidated the two cases for purposes of the pending motions. *See* Order dated September 26, 2000. The parties agree that their briefs on the *Adair* case control and that the court should apply its rulings on the *Adair* motions to the *Chaplaincy* case as well. *See* Stipulation dated September 25, 2000.

For the reasons that follow, the court will deny in part and grant in part the defendants' motion to dismiss. In addition, because the court declines to convert the defendants' motion to dismiss into a motion for summary judgment, the court will deny without prejudice the plaintiffs' motion for partial summary judgment and will order a briefing schedule on the plaintiffs' motion.

Moreover, because the court will now resolve the defendants' motion to dismiss, the court will deny as moot the defendants' motion to hold in abeyance the proceedings on the plaintiffs' motion for partial summary judgment until the court resolves the defendants' motion to dismiss. Lastly, the plaintiffs filed a motion to allow one chaplain plaintiff, who feared harassment and retaliation, to use a pseudonym to pursue this litigation. Because the plaintiffs filed a motion for class certification, which would render the motion for a pseudonym moot, the court will deny without prejudice the plaintiffs' motion to allow one plaintiff to use a pseudonym and will revisit the issue, if necessary, after the court has ruled on the plaintiffs' motion for class certification.

II. BACKGROUND

A. Factual History[2]

1. The Navy Chaplain Corps

Congress provided for the organization of the Navy Chaplain Corps, whose members are commissioned Naval officers who possess specialized education, training, and experience "to meet the spiritual needs of those who serve in

---

[2] For purposes of the instant motion to dismiss, the court must accept all the complaint's well-pled factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overturned on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Indeed, the defendants acknowledge this point in their motion to dismiss. *See* Mot. to Dismiss at 4 n. 1.

the Navy and their families." *See Adair* First Am. Compl. ("Compl.") at 21; *see also* Mot. to Dismiss at 4 (citing *10 U.S.C. § 5142); Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985) (rejecting Establishment Clause challenge to Army chaplaincy program since such program was necessary to protect Army personnel's free-exercise rights).

To comply with this congressional directive, the Department of Defense ("DoD") established a system to recruit professionally qualified chaplains for service in the Armed Forces "to provide for the free exercise of religion for all members of the Military Services, their dependents, and other authorized persons." *See* Mot. to Dismiss at 4 (quoting 32 C.F.R. § 65.2). The defendants explain that chaplains serve as Naval officers and, when seeking promotions, pursue the standard course for advancement through promotion to higher grades. *See id.* (citing 10 U.S.C. § 5142). Like other military officers, chaplains receive periodic reviews by promotion boards to determine which chaplains should be recommended for promotion. *See id.* (citing 10 U.S.C. § § 611 and 5142). The promotion boards are composed of five or more members, at least one of whom must be from the category under review. *See id.* at 4-5 (citing 10 U.S.C. § 612). Until recently, the Navy's chaplain promotion boards have generally included one line officer and four Chaplain Corps officers.[3] *See id.*, at 5.

2. Definitions

The Navy divides most of its Christian personnel into three general categories: Catholic, liturgical Protestant, and non-liturgical Christian. *See* Compl. at 21. The plaintiffs are all non-liturgical Christians. The Navy uses the term "special worship" to denote a small number of Christian and non-

---

[3] By line community, the parties refer to the operational service members as opposed to service members from the professional communities or the Chaplain Corps.

Christian faith groups that have unique or special needs for their worship and religious practices, including Jewish, Seventh-Day Adventist, Christian Science, Latter-Day Saints (Mormons), Muslim, Hindu, and other religions. *See id.* at 21 n.3.

The term "liturgical Protestant" refers to those Christian Protestant denominations whose services include a set liturgy or order of worship. *See* Compl. at 21. According to the plaintiffs, "this primarily includes those Protestant traditions or denominations that began during the Protestant Reformation and who retained an established liturgy in their worship services such as Lutheran, Reformed and Episcopal denominations, and the denominations which later evolved from them, e.g., Presbyterian and Methodist." *Id.* at 21-22. The plaintiffs explain that while every church "has some 'order' to its worship," these Protestant denominations do not have a worship service without the prescribed liturgy. *See id.* at 22 n.4. Another common feature of these liturgical denominations is that they all practice infant baptism. *See id.* at 22. Also known as "high Church" or "main line churches," "liturgical Protestant" is used by the plaintiffs to refer to chaplains of the Lutheran, Episcopal, Methodist, Methodist Episcopal, United Church of Christ, Congregational, Reformed and Presbyterian denominations, and the Orthodox tradition.[4] *See id.*

In contrast, "non-liturgical" denotes Christian denominations or faith groups that do not have a formal liturgy or order in their worship service. *See* Compl. at 22. According to the plaintiffs, these groups baptize only adults or children who have reached "the age of reason" and their clergy do not usually wear vestments or special religious dress during services. *See id.* Referred to by some Navy chaplains as "low church," the non-liturgical Christian categories include

---

[4] The defendants employ the same terminology as the plaintiffs for the sake of clarity. *See* Mot. to Dismiss at 5 n.5.

Baptist, Evangelical, Pentecostal, and Charismatic faith groups. *See id.* The Navy often refers to these faith groups as "non-liturgical Protestant." *See id.* The plaintiffs belong to this category and represent Southern Baptist, Christian Church, Pentecostal, and other non-liturgical Christian faith groups. *See id.*

3. Parties

In the *Adair* case, 17 current and former non-liturgical Christian chaplains filed suit.[5] The plaintiffs sue on their own behalf and, as a proposed class, on behalf of similarly situated chaplains.[6] The lawsuit challenges religious discrimination in the Navy Chaplain Corps ("the Chaplain Corps" or "the Corps"), "including the establishment of illegal religious quotas for Navy chaplain promotions and career opportunities; the establishment of a preferred religious tradition and a religious patronage system in the Corps; and creation of a pervasive climate of bias, animosity and deceit toward non-liturgical Christian Navy chaplains ...." Compl. at 4. In addition, the plaintiffs plead violations of the First and Fifth Amendments in the Corps' promotion, retention, and separation decisions. *See id.*

A sampling of the individual plaintiffs' allegations is as follows.

Plaintiff Robert Adair enlisted in the Navy in January 1967. *See id.* at 5. After completing his enlistment in 1970, he

---

[5] The 17 plaintiffs are: Robert H. Adair, Michael Belt, Dr. Gregory R. De Marco, Furniss Harkness, Michael Lavelle, George W. Linzey, Timothy D. Nall, Thomas Rush, James M. Weibling, Michael A. Wright, John Witherspoon (pseudonym), William C. Blair, Larry Farrell, Rafael J. Quiles, Lyle Swanson, Ronald Tomlin, and David S. Wilder.

[6] The court has ordered the parties to brief the issue about whether the *Adair* plaintiffs may proceed as a class and does not decide that issue for purposes of this decision. *See* Order dated September 28, 2001.

attended college and then earned a Master of Divinity degree in 1977. *See id.* The Southern Baptist convention, a non-liturgical Christian denomination, endorsed him and he became an active-duty Navy chaplain in 1979. "Despite his outstanding service, he was selected for early retirement in [Fiscal Year 1995] by a Selective Early Retirement Board (SERB) that selected only non-liturgical Christian chaplains while allowing liturgical chaplains with inferior records to continue on active duty." *Id.* Plaintiff Adair charges that he involuntarily retired in 1996. He alleges that, "but for the SERB decision, believed to rest on illegal religious discrimination and animosity toward his faith group, [plaintiff] Adair would have continued on active duty and retired at a higher pay rate." *Id.*

Lieutenant Michael Belt, an active-duty chaplain since 1991, alleges that a liturgical Protestant chaplain berated him for preaching that "men who call themselves Christians should live as Christians." *See* Compl. at 5. This liturgical Protestant chaplain allegedly gave Lieutenant Belt a low mark on his fitness report because he made this statement. *See id.* After Lieutenant Belt and another non-liturgical chaplain reformatted a Protestant worship service with low attendance, the congregation supposedly grew from 40 to about 130. *See id.* The liturgical Protestant chaplain who rated him, however, allegedly told him that his style of worship was "hogwash" and took over the service, returning it to a liturgical service. *See id.*

Dr. Gregory De Marco served as an enlisted Navy "hard hat" deep-sea diver from 1972 to 1981, at which point he left the Navy to attend a seminary. *See* Compl. at 6. In 1983, he was commissioned as a non-liturgical Christian chaplain and remained in the U.S. Naval Reserves until he was recalled to active duty in 1987. *See id.* The Navy promoted him to lieutenant commander in 1993 and he remained on active duty until 1998. *See id.* In December 1997, the liturgical command chaplain allegedly criticized plaintiff De Marco for ending his

prayers "in Jesus [sic] name." *See id.* When plaintiff De Marco "insisted on praying in accordance with his beliefs and religious tradition," the liturgical command chaplain allegedly rated him in a manner that made him non-competitive for promotion. *See id.* The plaintiff claims that this rating was based on "faith group prejudice and bias." *See id.* Because he allegedly suffered such significant hostility and prejudice, he decided to retire early to "save further humiliation, minimize his personal and professional injury, and minimize the disruption and damage to his family." *Id.* at 7. In effect, Dr. De Marco claims that the Navy's actions constituted a constructive discharge from his job based on religious prejudice. *See id.*

Another plaintiff, Furniss Harkness, asserts that the Navy denied him a promotion in retaliation for his successful challenge of a Navy policy to the Navy's Inspector General several years earlier. *See* Compl. at 7-8. Other named plaintiffs claim that the Navy discriminated against non-liturgical Christian chaplains by selecting them in very large proportion for early retirement. In addition, instead of being selected for early retirement by the SERB, they were allegedly personally pre-selected by the Chief of Chaplains. *See id.* at 9.

The plaintiffs also claim that the Navy exhibited a systematic pattern of prejudice against non-liturgical Christian chaplains with prior military service. *See id.* at 11. "The motivation behind this prejudice is the liturgical hierarchy's fear that a non-liturgical chaplain's prior military service gives him a competitive edge against other liturgical chaplains." *Id.* According to the plaintiffs, prior service can give a chaplain a greater understanding of how the Navy works and can provide an instant rapport with the sailors and Marines, resulting in more effective ministry and thus better fitness reports. *See id.* "In an equitable promotion system, some of these prior service chaplains would rise to the top of the Chaplain Corps, posing a threat to liturgical domination and control." *Id.* at 11-12.

Plaintiff James Wiebling states that he would have brought his claim against the Navy sooner, but the defendants deliberately and fraudulently concealed information from him. *See* Compl. at 12-13. He became aware of this supposed pattern of prejudice "only in late 1999 when ... he learned of the Stafford Report and its implications."[7] *Id.* at 12. He and several other named plaintiffs therefore ask for an equitable tolling of the statute of limitations. *See id.* at 13 and n.2.

The defendants in the *Adair* case, all sued in their official capacities, are Gordon R. England, Secretary of the Navy, Vice Admiral Norbert R. Ryan, Chief of Naval Personnel, Rear Admiral Byron Holderby, Jr., Chief of Chaplains, Rear Admiral Barry Black, Deputy Chief of Chaplains, and the United States Navy. *See* Compl. at 3.

B. Procedural History

In the companion case, *Chaplaincy of Full Gospel Churches v. England*, Dkt. No. 99cv2945, the plaintiffs filed their complaint on November 5, 1999. On January 10, 2000, the plaintiffs filed an amended complaint. Chaplaincy of Full Gospel Churches ("CFGC") is an ecclesiastical endorsing agency that certifies non-liturgical Christian clergy for service in the military.[8] *See Chaplaincy* First Am. Compl. at 1, 3. The DoD has approved CFGC as an endorsing agency since 1984. *See* Dkt. No. 99cv2945, Mem. Op. dated August 17, 2000 at 4 (Green, J.).[9] CFGC brought suit on behalf of itself and several of its chaplains, seeking both remedial and prospective relief.

---

[7] The court discusses the "Stafford Report" in Section II.C.2 *infra*.

[8] The *Chaplaincy* defendants are Gordon R. England, Secretary of the Navy, Vice Admiral Norbert R. Ryan, Chief of Naval Personnel, and the United States Navy. *See Chaplaincy* First Am. Compl. at 1.

[9] For a more detailed discussion of the factual background of the *Chaplaincy* case, see Judge Green's August 17, 2000 Memorandum Opinion at 2-7.

On February 2, 2000, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction, which the court denied. *See* Mem. Op. dated February 15, 2000 (Green, J.).

Meanwhile, on February 1, 2000, the defendants filed a motion to dismiss the amended complaint. On February 22, 2000, the plaintiffs filed a motion for leave to file a second amended complaint. The parties fully briefed these two motions. Then, on June 23, 2000, the plaintiffs filed a motion for partial summary judgment. The defendant responded to this motion with a motion to hold in abeyance the proceedings on the plaintiffs' joint motion for partial summary judgment until the court resolved the defendants' motion to dismiss.

On August 17, 2000, the court issued a Memorandum Opinion, granting in part and denying in part the defendants' motion to dismiss for lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1). *See* Mem. Op. dated August 17, 2000 (Green, J.). The court held that while CFGC had standing to sue on behalf of its chaplains, it lacked standing to sue on its own behalf. *See id.* Moreover, the court concluded that the plaintiffs could seek only prospective, and not remedial, relief. *See id.* The court also granted the plaintiffs' motion to file a second amended complaint. *See id.*

In the *Adair* case, the plaintiffs filed their class-action complaint on March 17, 2000. On June 16, 2000, the defendants filed a motion to dismiss. As they did in the companion case, the plaintiffs filed a motion for partial summary judgment on June 23, 2000, and the defendants again responded by filing a motion to hold in abeyance the proceedings on the plaintiffs' motion for partial summary judgment until the court had resolved the defendants' motion to dismiss.[10]

---

[10] In addition, the plaintiffs filed a separate motion for partial summary judgment. In their opposition to the defendants' motion to dismiss, the plaintiffs asked the court to somehow convert the

On September 5, 2000, the *Adair* plaintiffs filed a motion to amend their complaint, seeking to add six more plaintiffs, one additional Navy defendant, and three additional counts. *See* Compl. at 3. On September 22, 2000, the defendants filed a motion to dismiss the amended complaint. In addition, the parties jointly proposed that their briefing on the defendants' motion to dismiss the original complaint be incorporated as the briefing for the defendants' motion to dismiss the amended complaint. Judge Green agreed, and consolidated the *Adair* and *Chaplaincy* cases for purposes of resolving the preliminary motions and ordered that the briefing on the defendants' motion to dismiss in the *Adair* case would control.[11] *See* Order dated September 26, 2000 (Green, J.). Lastly, on October 21, 2000, the *Adair* plaintiffs filed a motion to allow a chaplain plaintiff to use a pseudonym in order to pursue this litigation.

On January 10, 2001, the Calendar Committee of the United States District Court for the District of Columbia randomly reassigned these two cases to this member of the court. Accordingly, the motions now pending before the court are as follows: (1) the defendants' motion to dismiss; (2) the defendants' motion to hold in abeyance the proceedings on the plaintiffs' motion for partial summary judgment until the court resolves the defendants' motion to dismiss; (3) the plaintiffs' motion for partial summary judgment; and (4) the plaintiffs' motion to allow a chaplain plaintiff to use a pseudonym.

---

defendants' motion to dismiss into a plaintiffs' motion for partial summary judgment. As discussed below, the court declines to do so at this juncture and has laid out a briefing schedule for both the plaintiffs' motions for summary judgment in its September 28, 2001 order and the order accompanying this Memorandum Opinion.

[11] Because the briefs in the *Adair* case control, from this point forward, the court's use of the term "plaintiffs" refers to the *Adair* plaintiffs, unless otherwise noted.

C. The Plaintiffs' Allegations

The plaintiffs claim that in the late 1960s and 1970s, America's religious demographics began a substantial shift away from liturgical Protestant denominations toward the non-liturgical Christian churches, which the plaintiffs represent. *See* Compl. at 29. "This trend continues today." *Id.*

Until the mid to late 1980s, the Navy -- like the Army and the Air Force -- used a rough proportional-representation plan to determine how many chaplains it would hire from various religious denominations, according to the plaintiffs.[12] *See id.* at 29. Under this system, the Navy allegedly allocated chaplains among the various faith groups based on objective criteria, such as the relative percentage a religion represented in the total American population, as reported in sources such as the annual *Yearbook of American and Canadian Churches*. *See id.* For example, if 100 Navy chaplains slots were authorized and Catholics comprised 25 percent of the American religious population and Baptists made up 20 percent, the Navy would try to hire 25 Catholic and 20 Baptist chaplains. *See id.*

Starting in the late 1980s and continuing to the present, however, the Navy -- unlike the Army and the Air Force -- allegedly switched to a subjective "needs of the service" policy, which, the plaintiffs plead, became the "thirds policy." *See* Compl. at 29. Under the thirds policy, the Navy allegedly reserves one-third of its slots in the Chaplain Corps for liturgical Christians, one-third for Catholics, and one-third for members of every other religion. *See id.* at 29-30. Non-liturgical Christians are included in this last, catchall category, along with all the "Special Worship" groups, such as Jewish, Muslim, Hindu, Buddhist, etc. *See id.* In addition, "one third of Navy chaplain promotions, retentions on active duty and accessions were allegedly reserved for liturgical Protestant chaplains,

---

[12] The Marine Corps is a subsection of the Navy, which supplies the Marine Corps' chaplains. *See* 10 U.S.C. § 5061; Compl. at 28 n. 5.

whereas this group represented less than one eleventh of the religious membership of the Navy." *Id.* at 30.

According to the plaintiffs, top officials in the Chaplain Corps instituted the thirds policy to continue a heavy representation of liturgical Christians in the Corps itself and in the Corps' highest command posts, despite the fact that the percentage of liturgical Christians was declining both in the country and in the Navy. *See id.*

1. The Navy's Religious Demographics

The Armed Forces records religious-preference data for its service members. *See Compl. at 27 Ex. 1* (a July 1998 report by the Defense Manpower Data Center ("DMDC")), Ex. 2 (a February 2000 DMDC report). The plaintiffs charge that the DMDC data demonstrates that liturgical Protestants made up about 8.76 percent of all DON active-duty personnel, i.e., both sailors and Marines, in 1998 and about 8.03 percent in 2000.[13] *See* Compl. at 28 (citing Exs. 1, 2). Specifically, in the 1998 report, service members of the various Methodist named or affiliated denominations comprised about 3.78 percent of all DON personnel, Presbyterian-related denominations comprised about 1.05 percent, the various Lutheran denominations comprised about 2.90 percent, Episcopal and Reformed Episcopal comprised about .73 percent, Methodist Episcopal comprised .20 percent, Reformed comprised about .10 percent, Orthodox .10 percent, for a total of about 8.76 percent. *See id.* (citing Ex. 1). This total had dropped to 8.03 percent in the February 2000 report. *See id.* (citing Ex. 2).

In 1998, Catholics represented 24.09 percent, or 132,429 out of 549,800 DON personnel, and 23.56 percent in 2000. *See*

---

[13] The defendants dispute the reliability of this data. For purposes of the defendants' motion to dismiss, however, the court must accept the plaintiffs' well-pled factual allegations as true. *See Scheuer*, 416 U.S. at 236.

id. (citing Exs. 1, 2). Thus, the plaintiffs point out that Catholics and liturgical Christians combined comprised less than one-third of the Navy's total personnel, with 32.85 percent in 1998 and 31.59 percent in February 2000. *See id.* According to the Navy's alleged thirds policy, however, these groups are receiving two-thirds, or 66.67 percent, of all chaplain slots. *See id.* at 29-30. On the other hand, identified non-liturgical Christian faith groups represent about 50 percent of the Navy's religious population, but the defendants allegedly place the non-liturgical Christians in the catchall group, whereby all other religions combined receive about one-third of the chaplain slots. *See id.* at 28.

2. The Specific Counts in the Plaintiffs' Complaint

The allegations set forth in the plaintiffs' 13-count complaint can be grouped into several categories.[14] As an overview, the three principal categories are the plaintiffs' First Amendment Establishment Clause claims, Free Exercise Clause claims, and their Equal Protection Clause claims. Additional claims include allegations that the defendants fraudulently concealed evidence of the plaintiffs' causes of action, that the Navy constructively discharged certain plaintiffs from their work by making the work conditions very difficult, that the Navy abridged the plaintiffs' religious speech in violation of the First Amendment, and that the Navy violated the Religious Freedom Restoration Act, 42 U.S.C. § 2000-bb *et seq.*

---

[14] The plaintiffs actually include 15 counts in their complaint, but Counts 14 and 15 are not separate allegations, but prayers for relief. In these "counts," the plaintiffs merely state that they seek declaratory relief and a permanent injunction. *See* Compl. at 52-53. The court, therefore, will not treat these items as separate counts. Indeed, since some of the plaintiffs' other 13 counts overlap significantly and do not necessarily even allege separate claims, the court determines that the best approach to take in this Memorandum Opinion is to group the counts by categories of allegations.

The court now turns to the allegations in more detail.

First, the plaintiffs charge that the Navy has established and maintained an unconstitutional religious quota system. Specifically, they claim that the Navy's objective in instituting the thirds policy was to create a denominational barrier that allows liturgical Protestant chaplains to maintain control of the Chaplain Corps. *See* Compl. at 29-32. In essence, the non-liturgical Christian chaplains allege that the Navy has devised a system through which it hires, promotes and retains chaplains from liturgical denominations, such as Catholics and liturgical Protestants, at a rate much greater than the liturgical Christians' representation among all DON personnel. *See* Compl. at 32.

For example, the plaintiffs charge that chaplain promotion boards consistently promote at least the same number of liturgical and non-liturgical Christian chaplains, elevating liturgical Christian chaplains in numbers far greater than the proportionate rate of liturgical Christians in the Navy. *See id.* at 30. They also plead that the promotion boards promote at least one-third liturgical Protestant chaplains in the Corps. *See id.*

As part of this system to maintain significant representation of liturgical Protestants in the Corps, the Navy also allegedly institutes a discriminatory retention policy, whereby it retains liturgical Protestants beyond their initial three-year tour of service at a disproportionately high rate as compared to their total membership percentage in the Navy. *See id.* at 31. According to the plaintiffs, the Navy has also routinely refused to retain non-liturgical Christian chaplains, resulting "in the over-representation of liturgical Protestant chaplains and the under-representation of non-liturgical Christians in the Navy chaplain program." *Id.* In short, the Navy's decisions regarding whether to retain chaplains are allegedly not based on "meeting the religious free exercise needs of Navy personnel, but solely on the basis of the

chaplain's religious faith group." *Id.*

The defendants also allegedly promote a disproportionate number of high-church Protestant and Catholic chaplains to the senior officer ranks, i.e., Captain and Admiral, and key billets[15] in the Chaplain Corps. *See* Comp 1. at 32. Through July 2000, only one non-liturgical person had held the office of Chief of Chaplains since 1917. *See id.* (citing Ex. 3).

The plaintiffs' exhibit 4 is a January 25, 1995 memorandum from the Marine Corps Chaplain, Larry Ellis, to the Navy Chief of Chaplains ("the Ellis Report"). *See id.* at 32-33, Ex. 4. The plaintiffs point to the Ellis Report as documentation for "years of apparent institutional bias against 'low-church' Protestant Navy chaplains in regard to assignments to the most prestigious and influential positions" within the Corps. Compl. at 32-33. As of the time of the report, only 14 clearly identifiable non-liturgical Christian chaplains had filled the 119 top Chaplain Corps positions in the previous 15 years, a fill rate of 11.8 percent. *See* Compl., Ex. 4. On the other hand, the fill rate for liturgical Protestants was 53.8 percent, *see id.*, "far out of proportion to the percentage of the liturgical denominations in the general population of the Navy." *See id.* at 33, Ex. 4. Even after learning of the Ellis Report's findings, the Navy allegedly took no action to address this disparity. *See id.*

According to the plaintiffs, these policies serve no legitimate purpose, are not based on remedying pass discrimination, and are not narrowly tailored. *See* Compl. at 34. "The effect of the Navy's denominational quota system and granting religious preferences to the liturgical Protestant religious tradition, is to impermissibly endorse liturgical Protestantism as an 'official' preferred religious tradition in

---

[15] "Billet" is the term the Navy uses for its employment positions. *See* Compl. at 33.

violation of the First Amendment's Establishment Clause." *Id.*

The next major set of allegations revolves around the defendants' chaplain-promotion system. First, the plaintiffs allege that, unlike the Army and Air Force, which use selection boards comprised of officers from other branches of the armed forces to select chaplains for promotion, chaplains dominate the Navy's chaplain selection boards. *See* Compl. at 37. Second, although the boards may consider only merit and not denominational affiliation, each promotion candidate's three-digit "faith group identifier" code is prominently displayed during the promotion process. *See id.* "This procedure has no other purpose than to identify a candidate's faith group to the board and thereby create a suspect religious category unrelated to any legitimate Navy objective." *Id.* Third, the plaintiffs assert that placing more than one chaplain on a chaplain promotion board perpetuates the cycle of illegal religious quotas, unconstitutionally delegates a governmental function to a religious body, and places a candidate's religious affiliation over a candidate's merits. *See id.* at 38-40.

Fourth, the plaintiffs claim that liturgical Protestant and Catholic chaplains have dominated the chaplain promotion boards even though these traditions represent less than a third of the religious preferences of Navy personnel. *See id.* at 38. A rear admiral, the Navy Chief of Chaplains ("the Chief") approves all the members of the Navy's chaplain promotion boards. *See id.* at 37. The plaintiffs charge that the Chief informed one board of his personal list of which chaplains constituted "the future of the Navy." *See id.* at 38. The board allegedly promoted the chaplains the Chief identified, which violates 10 U.S.C. § § 615 and 616(f)(2), the provisions that define the type of information that may be provided to the board and state that no official may exercise improper influence on the board. *See id.*

To support their allegations, the plaintiffs include a report on chaplain-promotion policies, issued on December 23,

1997 by Captain J.N. Stafford, special assistant for Navy Minority Affairs ("the Stafford Report"). *See* Compl., Ex. 5. The Stafford Report concluded "that the board may have systematically applied a denominational quota system." Compl. at 40. It called for an Inspector General ("IG") investigation into the Chaplain Corps' selection-board processes. *See id.* The Stafford Report also said, "if it is established that improper selection practices have systematically occurred, [then we should] shift responsibility for selection of chaplains for promotion to the line community." Compl., Ex. 5, at 3. In March 1999, a DoD IG investigation into the same boards found that a candidate's faith group "may have been a factor in" the decision making process for the 1998 commander boards in selecting chaplains for promotion. *See id.* at 40 (citing Ex. 6). The investigation also said, however, that there is "little indication of deficiencies in the Navy selection board process." *Id.*, Ex. 6.

The last promotion-related claim focuses on the Navy's use of regional chaplains, by which senior chaplains (primarily liturgical Christians) rate other chaplains rather than having a base commander rate each chaplain on his or her base. *See id.* at 44. Alleging that the system does not ensure religious neutrality, the plaintiffs claim that this arrangement violates the First Amendment. *See id.*

Next, the plaintiffs allege that the Navy's policy of having only a "general Protestant" service and restricting other forms of non-liturgical religious services violates both the First Amendment's Establishment and Free Exercise Clauses. *See* Compl. at 35. The plaintiffs claim that the defendants have tried to establish a de facto liturgical Christian religion for its personnel, thereby limiting the opportunity for non-liturgical Christian personnel to meet their religious needs. *See id.* By mandating a liturgical "general Protestant" service, the Navy has tried to shape all Protestant service members "into a single liturgical worship mold while ignoring or actively hindering the religious needs of non-liturgical personnel." *Id.*

The Navy has allegedly done this by denying or restricting non-liturgical Christian chaplains' ability to conduct services by removing non-liturgical Christian chaplains from preaching or conducting religious services and by opposing non-liturgical Christian worship alternatives. *See id.* For example, at the Navy's Naples, Italy base in 1999, there were nine English-speaking non-liturgical churches off-base, some of which met in "substandard facilities which were inadequate to hold the number of those wanting to attend, while Catholic and liturgical Protestants enjoyed spacious on post facilities designed for their styles of worship." *Id.* at 36. Moreover, the plaintiffs assert that senior officials in the Corps have criticized and berated non-liturgical Christian chaplains "for preaching and teaching on truths of the Christian faith and their specific religious tradition." *See id.* at 35.

Concluding this category of allegations, the plaintiffs lay out a broad claim that the Navy's policies and practices exhibit "manifest hostility" to non-liturgical Christian chaplains. *See* Compl. at 45. Specifically, although there are four times as many DON members of non-liturgical Christian faith groups than those of liturgical Protestant denominations, the Navy allegedly allocates chaplain positions in an irrational and arbitrary basis designed to hinder non-liturgical Christian faith groups. *See id.* at 46. The plaintiffs also charge that senior chaplains have intentionally given some non-liturgical Christian chaplains lower performance ratings than similarly situated liturgical Protestant and Catholic chaplains "solely on the basis of their religious identification and beliefs despite evidence of the non liturgical chaplain's superior performance." *Id.* Moreover, the Navy allegedly has a two-tiered system of discipline, whereby liturgical Christian chaplains receive lighter punishments for similar offenses than their non-liturgical Christian counterparts. *See id.* at 47. In addition, while the Navy provides career-planning information, such as postgraduate education opportunities to liturgical Christian chaplains, it does not give the same type of information to non-liturgical Christian chaplains. *See id.*

In sum, the plaintiffs protest their "second-class" treatment, which allegedly violates the Establishment, Free Exercise, and Free Speech Clauses of the Constitution's First Amendment, and the equal-protection component of the Fifth Amendment's Due Process Clause. *See id.*

Turning to the claims that focus on the Free Exercise Clause, the non-liturgical chaplains charge that some non-liturgical Christian chaplains and similar faith Navy personnel have been denied and selectively excluded from access to Navy facilities on the basis of discrimination against religious speech with a specific viewpoint, i.e., non-liturgical, evangelical, and low-church. *See* Compl. at 42. Essentially, the plaintiffs allege that the Navy's discriminatory policies and hostility deny both non-liturgical Christian chaplains and their would-be congregants their First Amendment constitutional right to the free exercise of their religion by denying or severely limiting their access to chaplains and worship services of their faith groups. *See id.* at 42 (citing 32 C.F.R. § 65.3). The plaintiffs claim that the under-representation of non-liturgical Protestant chaplains limits the ability of these chaplains to meet their community's religious needs. Thus, "non-liturgical chaplains must expend more effort to meet the needs of their faith group members than is required by liturgical Protestant chaplains." *Id.* The plaintiffs charge that these policies "are deliberately motivated by faith group bias." *Id.* at 43.

In a related claim, the plaintiffs plead that the defendants discriminate against non-liturgical Christian chaplains in violation of the First and Fifth Amendments by unlawfully disapproving the religious speech contained in their non-liturgical Christian tradition. *See id.* at 43-44. In a separate claim, the plaintiffs allege that since the Establishment Clause limits the taxing and spending power conferred by Article I, Section 8 of the Constitution, Congress may not appropriate tax funds to support the Navy's use of

such funds to favor one religion, in violation of the Establishment Clause. *See id.* at 45.

Next, the non-liturgical Christian chaplains anticipate a statute-of-limitations defense and claim that the Navy has fraudulently concealed evidence that would support the plaintiffs' causes of action. *See* Compl. at 47-51. That is, the Chaplain Corps "has lied to, misrepresented to, or otherwise mislead [sic] plaintiffs and others who have raised questions about the appearance of quotas, faith group prejudice, and/or the fairness or objectivity of the chaplain promotion and [retention] processes." *Id.* at 48-49. This alleged fraudulent concealment has prevented the plaintiffs and their class from seeking timely redress. *See id.* at 50. Accordingly, the plaintiffs argue that this "deception and concealment" warrants an equitable tolling of any statute of limitations for claims covered by this concealment and equitably estops the Navy from asserting a statute-of-limitations defense. *See id.*

Finally, the Navy has allegedly sought to retaliate and punish the plaintiffs who have brought this lawsuit, and has constructively discharged certain plaintiffs by making their work conditions intolerable to the point that the defendants gave these plaintiffs no choice but to leave the Navy or retire. *See* Compl. at 51. In addition, the non-liturgical Christian chaplains claim that the Navy has violated the Religious Freedom Restoration Act, 42 U.S.C. § 2000-bb *et seq.*, by illegally burdening the religious rights of the plaintiffs without a substantial governmental purpose. *See id.* at 51-52.

The plaintiffs seek declaratory relief and a permanent injunction. Among other things, they ask the court to strike down: the Navy's alleged thirds policy; the Navy's practice of placing more than one chaplain on chaplain promotion boards; the Navy's practice of allowing the Chief of Chaplains to determine the makeup of a promotion board or a SERB; the Navy's policy of identifying the faith group of each chaplain to be considered by promotion boards or SERBs; and the

Navy's alleged endorsement of "an official liturgical General Protestant service." *See* Compl. at 52-54. In addition, the plaintiffs call for an end to the alleged "dominance of the Navy's senior ranks and key billets by liturgical Protestant chaplains, out of all proportion to their actual percentages in the Navy," as well as the over-representation of liturgical Christian chaplains in the entire Chaplain Corps. *See id.* at 55. In essence, the plaintiffs ask the court for an order directing the Navy to bring both the entire Chaplain Corps and its senior officials "into line with the Navy's religious demographics." *See id.* at 59.

The court now turns to the defendants' motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

III. ANALYSIS

A. Legal Standard for a Motion to Dismiss

On a motion to dismiss pursuant to Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has jurisdiction. *See District of Columbia Retirement Bd. v. United States*, 657 F. Supp. 428, 431 (D.D.C. 1987). In evaluating whether subject-matter jurisdiction exists, the court must accept all the complaint's well-pled factual allegations as true and draw all reasonable inferences in the plaintiff's favor. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overturned on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The court is not required, however, to accept inferences unsupported by the facts alleged or legal conclusions that are cast as factual allegations. *See, e.g., Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990).

Moreover, the court need not limit itself to the allegations of the complaint. *See Hohri v. United States*, 251 U.S. App. D.C. 145, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds by* 482 U.S. 64, (1987). Rather, the court may

consider such materials outside the pleadings as it deems appropriate to determine whether it has jurisdiction in the case. *See Herbert v. National Academy of Sciences*, 297 U.S. App. D.C. 406, 974 F.2d 192, 197 (D.C. Cir. 1992).

For a complaint to survive a Rule 12(b)(6) motion to dismiss, it need only provide a short and plain statement of the claim and the grounds on which it rests. *See* FED. R. CIV. P. 8(a)(2); *Conley v. Gibson*, 355 U.S. 41, 47 (1957). A motion to dismiss under Rule 12(b)(6) tests not whether the plaintiff will prevail on the merits, but instead whether the plaintiff has properly stated a claim. *See* FED. R. CIV. P. 12(b)(6); *Scheuer*, 416 U.S. at 236. The plaintiff need not plead the elements of a prima-facie case in the complaint. *See Sparrow v. United Air Lines, Inc.*, 342 U.S. App. D.C. 268, 216 F.3d 1111, 1114 (D.C. Cir. 2000). Thus, the court may dismiss a complaint for failure to state a claim only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Atchinson v. District of Columbia*, 73 F.3d 418, 422 (D.C. Cir. 1996). In deciding such a motion, the court must accept all the complaint's well-pled factual allegations as true and draw all reasonable inferences in the nonmovant's favor. *See Scheuer*, 416 U.S. at 236.

B. The Appropriate Standard of Review

Before the court assesses the constitutionality of the defendants' various policies and practices at issue, the court must first determine what the appropriate standard of review should be in this case. While the parties disagree about some of the applicable standards and find common ground on others, the court determines that the constitutional issues implicated by this dispute are sufficiently intricate to warrant an exacting discussion of the applicable standards of review. Accordingly, the court will separate the plaintiffs' allegations into the three major constitutional rubrics the complaint discusses: alleged violations of the Establishment Clause, the

Free Exercise Clause and the Equal Protection Clause. The court will consider in turn, then, the appropriate standard of review for each category.

1. Establishment Clause Claims

As noted previously, most First Amendment religion cases deal with a challenge to a governmental law or policy that allegedly benefits or hinders religion as compared to non-religion. The case at bar, however, raises the *much rarer* type of First Amendment religion case in which the plaintiffs allege that a law or policy benefits one religious group over another. In these cases, the Supreme Court stands on even more heightened alert than in cases involving religion as opposed to the secular. Because the Supreme Court has established two distinct tests depending on which type of Establishment Clause case is at issue, and because the parties disagree about which test should apply, the court will begin its inquiry with an analysis of the relevant Supreme Court precedent.

a. *Lemon or Larson?*

The seminal Establishment Clause case involving religion as it relates to non-religion was *Lemon v. Kurtzman*, in which the Supreme Court struck down Rhode Island and Pennsylvania laws designed to provide state aid to boost the salaries of parochial-school teachers. *See* 403 U.S. 602 (1971). The Court held that the laws were unconstitutional because they promoted "excessive entanglement between government and religion." *See id.* at 614. In addition, the Court enunciated a three-pronged test for examining cases in which governmental action allegedly sponsored or hindered religion: to pass constitutional muster, (1) the statute must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) the statute must not foster "an excessive government entanglement with religion." *See id.* at 612-13 (internal citations

omitted).[16]

In subsequent cases, the Supreme Court has used the *Lemon* test to both uphold and strike down statutes. Declaring that a church's seeking to advance religion is permissible while a similar attempt on the government's part is impermissible, the Court upheld a law exempting religious organizations from federal civil rights statutes that prohibited employment discrimination on the basis of religion. *See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 337-40 (1987); *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding the constitutionality of the Nebraska legislature's practice of opening each session with a prayer by a chaplain paid with public funds). On the other hand, the Court deemed unconstitutional a New York statute creating a special school district for a small village inhabited by members of one religious sect, the Satmar Hasidim, because it violated the religion clauses' neutrality principal since its primary effect was to advance religion. *See Board of Ed. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994).

The second line of cases began with *Larson v. Valente*, in which the Supreme Court first applied a strict-scrutiny analysis, rather than the less rigorous *Lemon* test. *See* 456 U.S. 228 (1982). The Court stated that while *Lemon's* three-pronged test was appropriate in cases where the government arguably benefited or impeded religion as a whole in relation to the secular, in cases in which government allegedly prefers one religion over another, the more demanding strict-scrutiny

---

[16] Much has been written about the interplay between the Establishment Clause and the Free Exercise Clause. The *Lemon* test itself underscores this point. The test's second prong examines whether a law has the effect of inhibiting religion. *See Lemon*, 403 U.S. at 612. Undoubtedly, if a law's principal or primary effect inhibits religion, such a statute would also raise free exercise concerns. For more on the relationship and the "natural antagonism between the two clauses," *see* Ronald D. Rotunda & John E. Nowak, 5 Treatise on Constitutional Law § 21.1 (3d ed. 1999).

analysis applies.[17] *See id.* at 246. In *Larson*, the Court considered a section of Minnesota's Charitable Solicitations Act that provided that only those religious organizations receiving more than 50 percent of their funds from nonmembers were subject to the Act's registration and reporting requirements. *See id.* at 230. The Unification Church, which relied heavily on fundraising from nonmembers, brought suit, charging that the 50-percent rule discriminated against its organization in violation of the Establishment Clause. *See id.* Demanding strict adherence to the "principal of denominational neutrality," the Court held that:

> "the fullest realization of true religious liberty requires that government ... effect no favoritism among sects ... and that it work deterrence of no religious belief." In short, when we are presented with a state law granting a denominational preference, our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality ... Consequently, that [law] must be invalidated unless it is justified by a compelling governmental interest ... and unless it is closely fitted to further that interest.

Id. at 246-47 (internal quotation omitted).

Faced with evidence that Minnesota had conducted religious gerrymandering to help the Roman Catholic archdiocese avoid reporting requirements and to force the Unification Church to report, the Court raised concerns about the "risk of politicizing religion." *See id.* at 254. Leaving nothing to doubt, the Court declared that "the clearest

---

[17] Although the Court explicitly held that *Lemon's* three-pronged test did not apply in these denominational-preference cases, the Court did observe that the anti-entanglement prong was relevant in *Larson*. *See id.* at 252.

command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Id.* at 244.

In the case at bar, the plaintiffs clearly allege that the Navy, through its policies and practices, is favoring chaplains of liturgical Christian faiths over those of non-liturgical Christian faiths. *See, e.g.*, Compl. at 4, 23, 30. The plaintiffs' Establishment Clause claims, therefore, implicate the Supreme Court's Larson line of cases rather than *Lemon* and its progeny. *See Larson*, 456 U.S. at 246. Despite what should be readily apparent, the defendants would have the court believe that the D.C. Circuit has somehow overruled the Supreme Court on this issue. *See* Mot. to Dismiss at 10 n.7. Specifically, the defendants seem to contend that despite *Larson's* clear holding that courts should apply strict scrutiny when assessing laws or policies creating denominational preferences, "this Circuit has expressly reviewed the language in *Larson* and has chosen to continue applying the *Lemon* test even to laws that provide benefits to a specific religious sect that are not provided to other sects." *Id.*

In support of this proposition, the defendants point to one footnote in a D.C. Circuit case. *See id.* (citing United Christian Scientists v. Christian Science Bd. of Directors, 829 F.2d 1152, 1162 n.49 (D.C. Cir. 1987). In *United Christian Scientists*, the Court of Appeals affirmed a district court ruling that a law granting a church the extended copyright on all editions of a religious text violated the Establishment Clause, and chose to apply the *Lemon* test rather than the *Larson* test. *See United Christian Scientists*, 829 F.2d at 1162 n.49. Despite the defendants' contention, the Court of Appeals made it clear that one of the main reasons it chose to apply *Lemon* was because "*Larson's* application to the case at bar was neither considered by the district court, nor argued before us." *See id.* While the Court of Appeals did state that, "the [Supreme] Court has never returned to elaborate upon the doctrinal development it announced in *Larson*," *id.*, the defendants'

implication that this single statement signaled the D.C. Circuit's intent not to follow binding precedent from a Supreme Court case (decided only five years earlier) strikes the court as a significant overstatement.

The course of chronological events further undermines the defendants' position. The D.C. Circuit decided *United Christian Scientists* on September 22, 1987. But on June 24, 1987 -- three months earlier -- the Supreme Court decided *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, and left no doubt about the continuing vitality of *Larson: "Larson* indicates that laws discriminating *among* religions are subject to strict scrutiny, and that laws 'affording a uniform benefit to *all* religions' should be analyzed under *Lemon." See Amos*, 483 U.S. at 339 (internal citation omitted).[18] Moreover, two years later, in *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, the Court reiterated *Larson's* enduring importance: "we have expressly required 'strict scrutiny' of practices suggesting 'a denominational preference.'" 492 U.S. 573, 608-09 (1989) (quoting *Larson v. Valente*, 456 U.S. at 246) (holding that while a county's display of a creche violated the Establishment Clause, its display of a menorah next to a Christmas tree did not have the unconstitutional effect of endorsing Christianity and Judaism).[19] In sum, the court

---

[18] The court notes that it has no explanation for why the D.C. Circuit would have said that the Supreme Court has never returned to the "doctrinal development it announced in *Larson*" when the Supreme Court had, in fact, returned to the *Larson* doctrine only three months before the D.C. Circuit decided *United Christian Scientists*. *See United Christian Scientists*, 829 F.2d at 1162 n.49. This apparent confusion, however, does not excuse the defendants from performing their own independent case research, especially when even a rather cursory examination would have revealed that the *Larson* doctrine retains its status as important Supreme Court precedent.

[19] Interestingly, contrary to the defendants' assertion, the *Lemon* test has come under more serious questioning than the *Larson* test. In 1994, Supreme Court Justice Sandra Day O'Connor challenged *Lemon's*

rejects the defendants' theory that the D.C. Circuit has somehow abrogated the Supreme Court's decision in Larson. On the contrary, *Larson* remains alive and well, and its strict-scrutiny standard applies to this case.

b. Should Relaxed Strict Scrutiny Apply?

Moving on, the defendants argue that the Supreme Court has adapted its application of the strict-scrutiny test to the unique circumstances that exist within the military, and that the court should thus apply "a more deferential application of the strict scrutiny test." *See* Mot. to Dismiss at 11. To buttress their contention, the defendants rely heavily on the Supreme Court decision in *Goldman v. Weinberger*, which upheld an Air Force regulation prohibiting an Orthodox Jew from wearing a yarmulke because the Air Force had a strong interest in discipline that justified the strict enforcement of its

---

continuing relevance and proposed an alternative standard: "as the Court's opinion today shows, the slide away from *Lemon's* unitary approach is well under way. A return to *Lemon*, even if possible, would likely be futile, regardless of where one stands on substantive Establishment Clause questions. I think a less unitary approach provides a better structure for analysis." *Grumet*, 512 U.S. 687, 721 (O'Connor, J., concurring).

Three years later, the Court somewhat "repackaged" *Lemon*, as some commentators have described it. *See* Rotunda and Nowak, 5 Treatise on Constitutional Law § 21.3. In *Agostini v. Felton*, Justice O'Connor wrote the majority opinion that recast how the Court would examine whether government aid unconstitutionally advances religion. *See* 521 U.S. 203, 234 (1997). While courts should continue to evaluate a law's purpose, effect, and level of entanglement with religion, the majority held that in assessing the effect of a law or policy, courts should determine whether the government aid "result[s] in governmental indoctrination; define[s] its recipients by reference to religion; or create[s] an excessive entanglement." *See id.* Essentially, the Court folded *Lemon's* third prong -- whether a statute fosters an excessive entanglement with religion, *see Lemon, 403 U.S. at 613* -- into the new test for the "effect" prong. *See Agostini, 521 U.S. at 222-23, 233-34.* In arguing for *Lemon's* continued primacy, the defendants never mention *Agostini's* modification of the *Lemon* test.

uniform-dress requirement. *See* 475 U.S. 503. In *Goldman*, the petitioner claimed that the First Amendment's Free Exercise Clause allowed him to wear a yarmulke while in uniform even though this would violate Air Force regulation 35-10, which said that no military personnel shall wear headgear while indoors except for armed security police in the performance of their duties. *See id.* at 505. In rejecting the petitioner's challenge, the Court stated that, "our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." *Id.* at 507.

But the *Goldman* case differs from the case at bar in several crucial respects. First, *Goldman* dealt with a regulation that involved inherently operational, strategic, or tactical matters. *See id.* at 507-09. The challenged regulation related directly to the military's role in conducting national defense. Indeed, the Supreme Court emphasized this point in its decision and explained that the uniform-dress requirement played a significant part in an operational function of the military:

> The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank. The Air Force considers them as vital during peacetime as during war because its personnel must be ready to provide an effective defense on a moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble. We have acknowledged that "the inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit

> of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection."

Id. at 508 (internal quotation omitted).

Conversely, in the instant case, the issues revolve around considerations that are not related to strictly military affairs or to the defense of the country. That is, the policies at issue here are designed to hire, retain, and promote chaplains to satisfy the religious needs of Navy service members. These policies relate to quality-of-life issues for military personnel and have no specific operational, strategic, or tactical objective. As the defendants themselves acknowledge, Congress provided for the creation of the Navy's Chaplain Corps "to provide for the *religious needs* of Navy personnel." *See* Mot. to Dismiss at 4 (citing 10 U.S.C. § 5142) (emphasis added). Moreover, the defendants never try to articulate how the challenged policies and practices -- e.g., alleged religious preferences for liturgical Christian chaplains -- would further any operational, strategic, or tactical objectives. Indeed, this court is at a loss to see how the defendants could even argue that the alleged policies designed to favor liturgical Christian chaplains could possibly advance an important military objective.

The defendants suggest unconvincingly that because this case places the First Amendment in the military context, the Navy's chosen policies deserve "substantial deference." *See* Mot. to Dismiss at 18. But since operational or strategic considerations are not at issue, the court need not give the military the same level of deference in this case that it otherwise might. Furthermore, the cases the defendants rely on actually weaken their argument. For example, the defendants point to *Katcoff v. Marsh* for the proposition that:

> when a matter provided for by Congress in the exercise of its war power and implemented by the

> Army appears *reasonably relevant and necessary to furtherance of our national defense* it should be treated as presumptively valid and any doubt as to its constitutionality should be resolved as a matter of judicial comity in favor of deference to the military's exercise of its discretion.

Katcoff v. Marsh, 755 F.2d 223, 234 (2d Cir. 1985) (internal citations omitted) (emphasis added); *see also* Defs.' Reply ("Reply") at 4. While the *Katcoff* court -- which upheld the constitutionality of the Army's Chaplain Corps as a whole -- said that making religion available to soldiers qualified as a crucial imperative, the Navy has not articulated any reason why their policies and practices that allegedly favor liturgical Christianity and inhibit non-liturgical Christianity are "reasonably relevant and necessary to furtherance of our national defense ...." *See Katcoff*, 755 F.2d at 234. Accordingly, the relaxed strict-scrutiny standard for some cases involving the military does not apply in this case, and the court will apply the usual strict-scrutiny standard.[20]

The second major distinction between *Goldman* and the instant case is that the former was a Free Exercise Clause case. *See* Goldman, 475 U.S. at 504. While the instant case involves both Free Exercise Clause and Establishment Clause claims, the defendants offer *Goldman* as ostensible support for the sweeping proposition that in *all* matters relating to the First Amendment and the military, courts should show the armed forces substantial deference. This court rejects such a broad reading of *Goldman*.

In *Goldman*, the case presented the Supreme Court only with Free Exercise Clause issues, not Establishment Clause issues. *See id.* (stating that "Petitioner S. Simcha Goldman contends that the Free Exercise Clause of the First Amendment

---

[20] Even assuming *arguendo* than a relaxed strict-scrutiny standard should apply to this case, the court's analysis *infra* would remain the same.

to the United States Constitution permits him to wear a yarmulke while in uniform ...."). The Court drove home this distinction in discussing the balance between an individual service member's conduct and the larger goals of the military:

> the First Amendment does not require the military to accommodate [the wearing of religious apparel such as a yarmulke] in the face of its view that they would detract from the uniformity sought by the dress regulations. ... The First Amendment therefore does not prohibit [the regulations] from being applied to [Mr. Goldman] even though their effect is to restrict the wearing of the headgear required by his religious beliefs.

Id. at 509-10. This excerpt clearly demonstrates that the Court was referring to an issue involving an individual's free exercise of religion, rather than a prohibition on governmental action that an Establishment Clause claim would raise. In sum, while *Goldman* supports the proposition that an individual service member's First Amendment right to the free exercise of his religion may be limited in certain circumstances involving the military, the Court has never expanded this rationale to Establishment Clause cases. Barring an explicit directive from the Supreme Court or the D.C. Circuit to do so, this court refuses to take the first step down that slippery slope.

One final point merits discussion. As one district judge has stated in a similar case brought by an active-duty chaplain in California, "although this Court is mindful of the Supreme Court's admonishment that the judiciary should give substantial deference to matters related to management of the military, such protection does not extend to practices that may subvert one's inalienable constitutional rights." *Sturm v. United States Navy*, Dkt. No. 99cv2272 at 7 (S.D. Cal. 2000). This court wholeheartedly agrees. In this case, the defendants seem to be

telling the court that even if a case implicates crucial constitutional protections, the defendants should still prevail simply because the case involves the military.

To some extent, the defendants' confusion is understandable. While the Supreme Court's legal standard is relatively clear for Establishment Clause cases, *Goldman's* instruction for courts to accord "great deference" to the professional judgment of military authorities involving policies or practices that affect First Amendment free exercise claims provides the lower federal courts with little clear guidance. *See Goldman*, 475 U.S. at 507. Not surprisingly, the plaintiffs interpret the term "great deference" to mean that courts should still apply strict scrutiny to these cases. But interestingly, the defendants themselves interpret the term "great deference" to mean "a more deferential application of the strict scrutiny test." *See* Mot. to Dismiss at 11.

In her dissent in the *Goldman* case, Justice O'Connor highlighted the lack of a standard in criticizing the majority on the ground that "no test for free exercise claims in the military context is even articulated, much less applied. It is entirely sufficient for the Court if the military perceives a need for uniformity." *Goldman*, 475 U.S. at 528 (O'Connor, J., dissenting).[21] Perhaps a future case will provide the Court with an opportunity to take Justice O'Connor's suggestion and give the lower courts additional guidance in evaluating these claims.

2. Free Exercise Clause Claims

Unfortunately, neither party differentiates between the standard of review this court should apply in Free Exercise Clause cases as opposed to Establishment Clause cases. The

---

[21] In her dissent, Justice O'Connor does in fact articulate a test for evaluating Free Exercise Clause claims in the military context. *See Goldman*, 475 U.S. at 529-533 (O'Connor, J., dissenting).

defendants assert that the court should employ the relaxed strict-scrutiny standard for all three of the plaintiffs' principal claims: namely, those alleging violations of the Establishment Clause, the Free Exercise Clause, and the Equal Protection Clause. But as this court just discussed in the previous section, the Supreme Court's ruling in *Goldman*, a free exercise case, is inapplicable to the free exercise claims at issue here because the defendants have totally failed to articulate any reasons why the challenged policies and practices involving the hiring, promotion, and retention of chaplains relate to any important operational, strategic, or tactical objective.

Accordingly, the court relies on well-settled Supreme Court precedent in free exercise cases in the non-military context to provide the appropriate legal standard. The Supreme Court has set forth a two-track approach:

> a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice. ... A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32, (1993). In other words, in cases such as the one at bar in which the plaintiffs allege the defendants' policies and practices are not neutral and are not of general applicability, the court should apply the strict-scrutiny test. *See id.* Moreover, "[a] law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Id.* at 546.

3. Equal Protection Clause Claims

The plaintiffs argue correctly that the Fifth Amendment requires the Navy to treat non-liturgical Christian chaplains in the same manner that it treats liturgical Protestant chaplains.[22] See Pls.' Opp'n at 8 (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231-32(1995)). Notably, the equal-protection analysis in this case is very similar to the Establishment Clause and Free Exercise Clause standards of review in that, as noted above, the Supreme Court has held courts must apply strict scrutiny to any policy or practice that involves a denominational preference. *See, e.g., County of Allegheny*, 492 U.S. at 608-09; *Larson*, 456 U.S. at 246. Because the plaintiffs in this case have alleged that the Navy's policies and practices do involve denominational preferences, the court will apply strict scrutiny to the plaintiffs' equal-protection claims.

C. Statute-of-Limitations Issues

Title 28 U.S.C. § 2401(a) establishes a six-year statute-of-limitations period for a plaintiff to commence a civil action against the United States after the right of action first accrues. *See* Mot. to Dismiss at 28 (citing 28 U.S.C. § 2401(a)). While the parties do not dispute that section 2401(a) sets forth the applicable limitations period, they disagree about when the time period began to accrue.

In essence, the defendants assert that the proper accrual date for claims for discrimination or illegal actions taken against military personnel is when the action or discharge becomes final. *See* Mot. to Dismiss at 29 (citing *Kendall v. Army Bd. for Correction of Military Records*, 996 F.2d 362, 365-66 (D.C. Cir. 1993)). Accordingly, since the plaintiffs

---

[22] Because the Fourteenth Amendment's Equal Protection Clause applies only to laws enacted by state and local governments, the Supreme Court has held that the Fifth Amendment's Due Process Clause includes an equal-protection component that can be applied to potential equal-protection violations by the federal government. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497, 498-500, 98 L. Ed. 884, 74 S. Ct. 693 (1954).

filed their complaint on March 17, 2000, the defendants insist that the statute of limitations bars any claims that accrued before March 17, 1994 and that the court should dismiss these claims for lack of subject-matter jurisdiction pursuant to *Federal Rule of Civil Procedure 12(b)(1)*. *See* Mot. to Dismiss at 29. The defendants thus maintain that the court should dismiss the claims of plaintiffs Timothy Nall and James Wiebling, who left active duty before March 17, 1994. *See id.* at 29-30. Moreover, the defendants contend that because the statute of limitations at issue is jurisdictional, *see Kendall, 996 F.2d at 366*, the court should also dismiss the claims of several other plaintiffs who do not allege when they left active-duty service or when, during service, they suffered their alleged injuries. *See* Mot. to Dismiss at 30.

The plaintiffs counter by contending that the defendants have engaged in a continuous violation and self-concealing fraud. *See* Pls.' Opp'n at 37. The plaintiffs further argue that because the Navy fraudulently concealed crucial information that prevented them from alleging a crucial element of their claim, the "accrual" date was tolled during the period of concealment and did not begin to run until the plaintiffs first learned of the defendants' alleged fraudulent concealment. *See* Pls.' Opp'n at 36 (citing *Hohri v. United States*, 782 F.2d 227, 249 (D.C. Cir. 1986), *vacated and remanded on other grounds*, 482 U.S. 64 (1987)).

The D.C. Circuit has made it clear that "when a defendant fraudulently conceals the basis of a plaintiff's cause of action, the statute of limitations is tolled until the time that a reasonably diligent plaintiff could have discovered the elements of his claim." *Hohri*, 782 F.2d at 246. The question in this case then becomes whether the defendants fraudulently concealed the basis of the plaintiffs' claims. But this court need not decide the issue at this juncture. This is because the D.C. Circuit has held that "courts should hesitate to dismiss a complaint on statute of limitations grounds based solely on the face of the complaint." *Firestone v. Firestone*, 76 F.3d 1205,

1209 (D.C. Cir. 1996) (citing *Richards v. Mileski*, 662 F.2d 65, 73 (D.C. Cir. 1981)). The D.C. Circuit has also instructed that "because statute of limitations issues often depend on contested questions of fact, dismissal is appropriate only if the complaint on its face is conclusively time-barred." *Firestone*, 76 F.3d at 1209 (citing *Richards*, 662 F.2d at 73).[23]

Finally, the plaintiffs correctly submit that they need not plead fraudulent concealment in the complaint, but rather that their obligation to do so "arises only when defendant raises the statute of limitations as a defense." *See* Pls.' Opp'n at 36 (quoting *Firestone*, 76 F.3d at 1210). For all these reasons, the court applies the D.C. Circuit's well-settled precedent and concludes that a ruling on the defendants' statute-of-limitations argument would be premature. Accordingly, the court denies without prejudice the defendants' motion to dismiss certain claims on limitations grounds and will reconsider the defendants' argument if it is raised in a possible motion for summary judgment after the parties have conducted discovery.

D. The Defendants' Administrative-Exhaustion Argument

The defendants' contention that the individual chaplain plaintiffs should have first exhausted their administrative remedies by raising their personnel claims with the Board for Correction of Naval Records ("BCNR") before coming to federal court warrants little attention. *See* Mot. to

---

[23] It is worth noting that the defendants' reliance on *Bigelow v. Knight* for the proposition that courts should dismiss a complaint when the plaintiff fails to allege the facts necessary for subject-matter jurisdiction is misplaced since *Bigelow* was a diversity case in which the plaintiff failed to allege the domicile and citizenship of the parties. *See* Mot. to Dismiss at 30 (citing *Bigelow v. Knight*, 737 F. Supp. 669, 670 (D.D.C. 1998)). In contrast, "the statute of limitations is an affirmative defense that defendant must prove ...." *Firestone*, 76 F.3d at 1210. The D.C. Circuit recognizes that it would be totally illogical for courts to require plaintiffs to include in their complaints counter arguments to a *possible* statute-of-limitations defense that the defendants may or may not raise.

Dismiss at 32. The defendants argue that by requiring the plaintiffs to seek their remedies first before the BCNR, an administrative body, the court could enable the Navy itself to correct any mistakes or injustices that may have occurred. *See id.* But the plaintiffs respond persuasively by pointing to a similar case involving the Air Force Board for the Correction of Military Records ("AFBCMR"). *See* Pls.' Opp'n at 43 (citing *Glines v. Wade*, 586 F.2d 675, 678 (9th Cir. 1978)), *rev'd on other grounds sub nom. Brown v. Glines*, 444 U.S. 348 (1980)). In *Glines*, the Ninth Circuit stated that "the AFBCMR was never intended by Congress to resolve the essentially legal issues involved in this case. Like other BCMRs, it is a clemency-oriented body, with authority to 'correct an error or remove an injustice,' 10 U.S.C. § 1552(a), not to declare the law." *Glines*, 586 F.2d at 678. Noting that the BCMRs "are not necessarily legally trained," the court stated that the board lacked the authority to declare the challenged regulations invalid. *See id.*

The defendants attempt to distinguish *Glines* by suggesting that in that case, the plaintiff challenged the constitutionality of specific military regulations, whereas the plaintiffs at bar challenge putative "policies," which the Navy's BCNR is equipped to handle. *See* Reply at 21. This argument falls flat. In this case, the gravamen of the plaintiffs' claims revolves around constitutional challenges based on the First Amendment's Establishment and Free Exercise Clauses and the Fifth Amendment's Due Process Clause. As the Ninth Circuit held in an earlier case, "resolving a claim founded solely upon a constitutional right is singularly suited to a judicial forum and clearly inappropriate to an administrative board." *Downen v. Warner*, 481 F.2d 642, 643 (9th Cir. 1973). The court rejects the defendants' argument on this point.

E. The Plaintiffs' Establishment, Free Exercise, and Equal Protection Clause Claims

As discussed *supra* in Section III.B., the court must apply strict scrutiny in assessing which, if any, of the

plaintiffs' various causes of action under the three major constitutional rubrics may survive the defendants' motion to dismiss for failure to state a claim pursuant to *Federal Rule of Civil Procedure 12(b)(6).* Accordingly, because the legal standards are the same, the court addresses these claims together.

1. The Hiring and Retention of Navy Chaplains

The plaintiffs allege that the Navy has established and maintained an unconstitutional religious quota system, which "allow[s] liturgical Protestant chaplains to maintain liturgical control of the Navy Chaplain Corps while excluding non-liturgical chaplains from influence and representation." Compl. at 30. Charging that the thirds policy amounts to an unconstitutional establishment of liturgical Christianity, the plaintiffs decry a structure that leads to a much greater percentage of liturgical Christians in the Chaplain Corps than their proportionate rate among all DON personnel.

In support of their claim, the plaintiffs provide hard statistics. Specifically, the DMDC reports indicate that liturgical Protestants comprised about 8.76 percent and 8.03 percent of all DON personnel in 1998 and 2000 respectively. *See* Compl. at 28 (citing Exs. 1, 2). In addition, Catholics represented 24.09 percent of all DON personnel in 1998, and 23.56 percent in 2000. *See id.* In contrast, members of non-liturgical faith groups represent about 50 percent of the Navy's religious population. *See id.* at 28. Under the alleged thirds policy, however, Catholics and liturgical Christians combined, who constituted 32.85 percent of all DON personnel in 1998 and 31.59 percent in 2000, received two-thirds (66.67 percent) of all the Navy's chaplain slots. *See id.* at 29-30.

The defendants respond somewhat feebly that the statistics cited by the plaintiffs are unreliable because they are based on voluntary declarations of religious affiliation made by service members when they entered the Navy. *See* Mot. to

Dismiss at 16. Without offering a better system to identify its personnel's religious demographics, the defendants explain that some Navy personnel may choose not to declare their religion, some may change their affiliation after filling out the form, and some may declare their affiliation but not attend worship services or use the ministry resources of the chaplains. *See id.* The Navy also notes that there is far greater turnover among Navy personnel than there is in the Chaplain Corps, making it more difficult to determine religious affiliation among all service members. *See id.* n.9. Moreover, the defendants contend that if they tried to collect more precise data on the religious affiliation of their personnel, this would entail significant interference by the Navy into its personnel's free exercise and privacy rights that "would constitute inappropriate entanglement by the government into the worship and beliefs of Navy personnel." *See id.* Without engaging in an extended colloquy on this point, suffice it to say that this court views the defendants' argument as rather far-fetched. For example, to obtain more information about its personnel, the Navy could circulate a voluntary biographical form once per year, and the form could be submitted anonymously to avoid any infringement on a service member's privacy rights.

But the more important point is that the defendants, in proffering their various protestations to the plaintiffs' statistics, seem to have forgotten a fundamental procedural mantra that this court must follow. That is, in ruling on a motion to dismiss, the court must accept the plaintiffs' well-pled factual allegations as true and draw all reasonable inferences in the plaintiffs' favor. *See Scheuer*, 416 U.S. at 236. In this case, the court determines that the statistics the plaintiffs cite are indeed well-pled factual allegations. Rather than being concocted by the plaintiffs, the statistics about the Navy's religious demographics -- taken at two separate points in time -- come from an independent third party. And taken in conjunction with their allegations about the thirds policy, the plaintiffs have properly asserted that the Navy

intentionally[24] hires liturgical Protestant chaplains dramatically out of proportion from their overall representation among DON personnel.

Similarly, in terms of the defendants' retention policies, the plaintiffs clearly offer well-pled factual allegations that the Navy institutes "a deliberate, systematic, discriminatory" retention policy "whose purpose was to keep non-liturgical chaplains from continuing on active duty, thus ensuring they would not be considered for promotion and minimizing their future influence." Compl. at 31. To pursue this alleged objective, the defendants would retain liturgical Protestant chaplains beyond their initial three-year tour of service and at a significantly higher rate than their representation among all DON personnel. *See id.* at 31-32.

Applying the legal standard to the facts of this case, the court holds that the plaintiffs have stated a claim that the defendants' policies and practices relating to the hiring and

---

[24] The court notes the importance of the government's intent in the Establishment Clause calculus. The majority in the Supreme Court case of *Larson v. Valente* did not specify whether strict scrutiny would also apply when the facts show no evidence of the government's intent to prefer one sect over another but merely a disparate effect on various sects. *See Larson*,456 U S. 228. The *Larson* Court consistently stressed that it had evidence showing that the "statute does not operate evenhandedly, nor was it designed to do so ...." *Id.* at 253.

Similarly, in this case, the plaintiffs allege that the Navy has deliberately adopted policies designed to maintain liturgical Christian control over the Chaplain Corps. For instance, the plaintiffs claim that the Navy used objective criteria, i.e., national religious demographics, to allocate chaplains until the late 1980s, but switched to subjective criteria when it began to notice large losses in liturgical Protestant faith groups. *See* Pls.' Opp'n at 17. "The motivation for this change was the Navy Chaplain Corps' liturgical hierarchy's fear of non-liturgical chaplains gaining power and influence while liturgicals lost control." *Id.* Because the plaintiffs have clearly alleged an intentional preference, the court need not address what standard of review should apply to cases in which plaintiffs claim a disparate effect on a religious sect.

retention of chaplains violate the Establishment Clause of the First Amendment. Underscoring its unwavering adherence to the "principle of denominational neutrality," *see Larson*, 456 U.S. at 246, the Supreme Court declared that "the clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Id.* at 244. This is precisely what the plaintiffs in this case allege that the Navy has done.

At times, reading the attorneys' briefs in this case is like attending a debate in which the participants have shown up in two different rooms. While the lawyers have clearly put significant time, energy, and thoughtfulness into their briefs, they sometimes fail to directly address the other party's key point. For example, the plaintiffs ask the court for an order requiring the Navy to bring its Chaplain Corps, including its current rank structure, in line with the Navy's religious demographics. *See* Compl. at 59. But the defendants use this fact to launch a misconstruction of the plaintiffs' argument, interpreting it to mean that in order to pass constitutional muster, the Navy Chaplain Corps "must be organized along the denominational breakdown that matches the proportional presence of faith groups in the overall Navy population ...." *See* Mot. to Dismiss at 8. While the plaintiffs would approve of a proportional-representation scheme and, indeed, essentially ask for such an approach, nowhere do they insist that this is the *only* constitutional option. Rather, the plaintiffs' main point is that the defendants' current system for hiring and retaining chaplains is unconstitutional.

As discussed at length in Section III.B. *supra*, this case requires the court to apply a strict-scrutiny test to practices suggesting a denominational preference. *See County of Allegheny*, 492 U.S. at 608-09. Consequently, the governmental policy or practice "must be invalidated unless it is justified by a compelling governmental interest, and unless it is closely fitted to further that interest ...." *Larson*, 456 U.S. at 247 (internal citations omitted).

Instead of articulating how its policies and practices regarding the Chaplain Corps are justified by a compelling governmental interest and how its policies and practices are closely fitted to further that interest, the defendants spend much of their time telling the court what is wrong with a proportional-representation system. The parties agree that "the Chaplain Corps exists to serve a compelling governmental interest providing for the free exercise needs of the [DON personnel]." Pls.' Opp'n at 13; Mot. to Dismiss at 12. But the plaintiffs question how the Navy accomplishes its compelling government interest by:

> a) its over-representation of chaplains of the Protestant Liturgical faith groups whose members represent about 8% of the Navy and b) its consequent under representation [sic] of non-liturgical chaplains whose members represent the majority of the Navy's religious needs. The Navy has not explained how it determines its chaplain allocations among faith groups and why 8% of the Navy's religious population receives [more than four times that percentage] of the Chaplain authorizations.

Pls.' Opp'n at 13. In short, the plaintiffs challenge both prongs of the strict-scrutiny test, disputing how the Navy's policies and practices justify its compelling governmental objective of meeting the free-exercise needs of DON personnel and how these policies and practices are narrowly tailored to accomplish that objective. *See id.* at 15. The defendants respond that their decision not to adopt a proportional-representation policy passes the strict-scrutiny test as applied to the unique context of the military. *See* Mot. to Dismiss at 19. But as discussed in section III.B.1.b *supra*, a relaxed strict-scrutiny test does not apply to these facts.

Another misreading of the plaintiffs' argument appears in the defendants' effort to make a point about the compelling

interest of meeting their personnel's ability to practice their religion. The defendants urge that they must ensure that the Chaplain Corps includes a broad spectrum of religious faiths:

> To guarantee such diversity of religious denominations in the Chaplains [sic] Corps -- and thereby maintain a capacity to serve a broad segment of faiths -- it is permissible for the Navy to take into account the denomination of chaplains in order to regulate the faith group composition with the Corps. Only by considering an individual chaplain's faith group can the Chaplain Corps effectively structure itself to meet the free exercise needs of the Navy and serve its vital support role in the Navy's mission. Indeed, there is no other practicable way to insure that the Chaplain Corps will have a diverse and sufficient supply of chaplains from various faiths without taking denomination into account in filling its staffing needs.

Mot. to Dismiss at 13. Unfortunately, the defendants confuse two of the plaintiffs' arguments. While the plaintiffs do challenge the Navy's policy of identifying the religious denomination of a chaplain being considered for promotion, *see infra* Section III.E.2, the plaintiffs *never argue* with the notion that the Navy must consider religious affiliation in making its hiring decisions. Indeed, the plaintiffs' request for a proportional-representation system in the Chaplain Corps that would mirror the religious demographics of all DON personnel necessarily contemplates taking faith into account in hiring decisions. *See* Compl. at 59.

Moreover, the defendants seem to forget that at this early stage in litigation, the crucial inquiry is not whether a proportional representation scheme is practicable or mandated by the Constitution, but whether the plaintiffs have stated a claim that the defendants' hiring and retention policies violate

the Establishment Clause.[25] *See* FED. R. CIV. P. 12(b)(6); *Scheuer*, 416 U.S. at 236 ("When a federal court reviews the sufficiency of a complaint ... the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."). In their attempt to do so, the plaintiffs stress that the policies and practices challenged here are unique to the Navy, and that the other branches of the Armed Forces, the Army and the Air Force, "meet their obligations to provide for the religious free exercise needs of their service members under the same general service constraints which the Navy argues require it to ignore the Constitution." Pls.' Opp'n at 2. In brief, the plaintiffs assert that although the First Amendment does not contain the words "proportional representation," it does mandate neutrality among faith groups. *See id.* at 13. Arguing that the thirds policy amounts to a "religious gerrymander," the plaintiffs charge that the Navy does not explain how its subjective allocation of chaplains between faith groups is neutral. *See id.* at 12-13. "When compared to its religious demographics, the Navy's allocation of chaplains conveys a message of preference." *Id.* at 14.

The court holds that the plaintiffs have stated a claim that the defendants' policies and practices relating to the hiring and retention of its chaplains are not justified by a compelling governmental objective and are not narrowly tailored to accomplish that objective. Accordingly, the plaintiffs have successfully stated a claim that these policies and practices violate the strict-scrutiny test and that they violate the Establishment Clause. The court thus denies the defendants' motion to dismiss these claims.

---

[25] For this reason, the court need not address at this juncture the parties' considerable dialogue concerning the defendants' hypothetical scenario, which purportedly demonstrates the pitfalls of a proportional-representation scheme. *See* Mot. to Dismiss at 17 n. 10.

2. The Navy's Promotion of Chaplains[26]

The plaintiffs challenge several of the defendants' policies and practices relating to chaplain promotion boards. For the reasons that follow, the court grants in part and denies in part the defendants' motion to dismiss these causes of action for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Specifically, the court grants the defendants' motion to dismiss the plaintiffs' claims that chaplains should not rate other chaplains and that more than one chaplain should not sit on a chaplain promotion board. On the other hand, the court denies the defendants' motion to dismiss the plaintiffs' claim that a chaplain's religious affiliation should not be identified to a chaplain promotion board.

a. The Composition of Chaplain Promotion Boards

Responding to the plaintiffs, the defendants argue that as duly appointed Naval officers, chaplains, as with any of the

---

[26] The plaintiffs have also moved for partial summary judgment on several aspects of the Navy's chaplain-promotion system. *See* Pls.' Opp'n to Defs.' Mot. to Dismiss and Pls.' Mot. for Partial Summ. J. at 19-32. The plaintiffs' motion presents evidence outside the pleadings and asks the court to convert the defendants' motion to dismiss into the plaintiffs' motion for partial summary judgment. The court refuses to do so, and agrees with the defendants that even assuming *arguendo* that the plaintiffs' request was a proper procedural maneuver, the court would still deem it inappropriate to treat any of the motions before the court as a motion for summary judgment when the defendants have not had an opportunity to submit any extra-pleading materials. *See* Reply at 3 n.1. In addition, the court makes clear that it has not considered any of the plaintiffs' extra-pleading exhibits in deciding the instant motions.

Lastly, the plaintiffs have also filed a separate motion for partial summary judgment, which seeks to strike down the Navy's alleged thirds policy. As explained in the court's order dated September 28, 2001 and the order accompanying this Memorandum Opinion, the court will consider the parties' views in their joint status report and will then set forth appropriate briefing schedules for both of these motions.

other staff-corps officers, "legitimately participate in the normal course of duties for officers, including sitting on appropriate promotion boards and rating the performance of junior officers. These actions do not run afoul of the Establishment Clause." Mot. to Dismiss at 20. The defendants also take issue with the plaintiffs' claim that placing more than one chaplain on a promotion board discriminates on the basis of religious faith. *See id.* The court agrees that the plaintiffs have failed to state a claim on both points.

i. Allowing Chaplains to Rate Other Chaplains

First, the court holds that the practice of allowing chaplains to rate other chaplains for promotions does not state a violation of the Establishment Clause. Pressing their argument on this point, the plaintiffs claim that unlike the Army and Air Force, which use selection boards comprised of officers from other branches to select chaplains for promotion, chaplains dominate the Navy's chaplain promotion boards. *See* Compl. at 37. The plaintiffs argue that this practice constitutes a First Amendment violation because "the opportunity for mischief is to [sic] great." *See* Pls.' Opp'n at 32. Essentially, the plaintiffs ask the court to believe that the usual rule for a chaplain sitting on a promotion board will be to discriminate against promotion candidates on the basis of religious denomination. The court refuses to accept that assumption.

Well-settled case law instructs courts to presume that government officials will conduct themselves properly. As this court has said, "government officials are presumed to act in good faith. ... plaintiff must present 'well-nigh irrefragable proof' of bad faith or bias on the part of governmental officials in order to overcome this presumption." *China Trade Center, L.L.C. v. Washington Metro. Area Transit Auth.*, 34 F. Supp. 2d 67, 70-71 (D.D.C. 1999), *aff'd*, 1999 U.S. App. LEXIS 19433, No. 99-7029, 1999 WL 615078 (D.C. Cir. 1999) (per curiam) (stating that decisions of governmental officials "are entitled to a presumption of validity"); *see also Chaplaincy of Full Gospel*

Churches v. Danzig, Dkt. No. 99-2945, Mem. Op. and Order dated February 14, 2000 at 4 (D.D.C. 2000) (Green, J.).

In addition, the plaintiffs' argument on this point is highly speculative. The defendants underscore this weakness by noting that merely because an official could *possibly* use his or her authority to impermissibly infringe on religious liberty cannot state a violation of the First Amendment. *See* Reply at 8. "Only if an official *in fact* acts to infringe religious liberty in an unconstitutional manner is there a First Amendment violation that the courts can take cognizance of and, generally, remedy." *Id.* As it stands now, the plaintiffs would have great difficulty in demonstrating that they have suffered the injury-in-fact necessary to have standing to bring such a claim. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In sum, the defendants correctly maintain that the plaintiffs' assertion that chaplains will necessarily discriminate against other chaplains on the basis of religion is an unsupported allegation that is not sufficient to state a claim for a First Amendment violation.

Another persuasive reason to allow chaplains to rate other chaplains is that the Chaplain Corps fulfills a unique mission within the Navy that requires it to perform duties significantly different from those of Naval line officers and Naval officers in other staff corps. "Consequently, officers in the Chaplain Corps are much better qualified by reason of their knowledge and experience to review and analyze the performance of other chaplains in fulfilling their duties within the Corps." Mot. to Dismiss at 21. As this court has observed:

> Staff corps promotion boards have been traditionally composed of officers who are members of the same staff corps. In this manner, doctors consider doctors, judge advocates consider judge advocates and so on. The logic is apparent. Those in the same profession are more qualified to evaluate others in their profession. It

> is neither likely that a doctor would know how to evaluate a chaplain, nor vice versa.

Emory v. Secretary of the Navy, 708 F. Supp. 1335, 1339 (D.D.C. 1989) (Green, J.) (internal citations omitted). The court agrees with this line of reasoning and grants the defendants' motion to dismiss the plaintiffs' claim that chaplains should not rate other chaplains.

ii. Having More than One Chaplain on a Chaplain Promotion Board

The plaintiffs' second attack on chaplain promotion boards centers on their claim that having more than one chaplain on a board would provide an opportunity for religious bias because selection boards will inherently discriminate among religious denominations based on their own preferences. *See* Mot. to Dismiss at 21 n.14. For substantially the same reasons as those articulated in the previous section, the court determines that the plaintiffs have failed to state a claim that this practice violates the First Amendment.

Title 10 U.S.C. § 612 states that a Navy chaplain selection board shall consist of five or more officers who are on the Navy's active-duty list. *See* 10 U.S.C. § 612(a)(1). In this case, the plaintiffs never explain why having one chaplain on a promotion board is constitutional, but having more than one chaplain is unconstitutional. Can a chaplain somehow restrain herself from discriminating on the basis of religious affiliation if she is the only chaplain on a board but not hold back from making biased decisions if other chaplains sit on the board? This argument defies common sense.

Finally, the plaintiffs' contention that having chaplains rate other chaplains delegates a religious function to the governmental body is unfounded. All chaplains, including the Chief of Chaplains, are officers. *See* 10 U.S.C. § 5142. "The

Chief of Chaplains shall be appointed by the President, by and with the advice and consent of the Senate, from *officers* of the Chaplain Corps in the grade of commander or above who are serving on active duty and who have served on active duty in the Chaplain Corps for at least eight years." *Id.* Furthermore, the defendants properly distinguish the authority the plaintiffs rely on, *Larkin v. Grendel's Den*, in which a zoning law effectively gave private churches veto power on the granting of liquor licenses within 500 feet of their church building, by noting that chaplains are Naval officers, not private clergy. *See* 459 U.S. 116. "As officers, it is appropriate for [chaplains] to undertake the duties routinely performed by Naval officers, including serving on promotion boards." Mot. to Dismiss at 23. The fact remains, Navy chaplains are first and foremost Naval officers. And when chaplains sit on promotion boards, they act as officers who are evaluating a fellow officer's fitness for promotion.

Nothing in the Establishment Clause can be read to mean that the Constitution prevents all chaplains from making any governmental decision, such as whether to promote another officer. Accordingly, the court concludes that the plaintiffs have failed to state a claim on either of their challenges to the composition of chaplain promotion boards.

b. Identifying the Religious Denomination of a Chaplain-Promotion Candidate

The plaintiffs fare much better, however, when advancing their argument that an individual chaplain's religious affiliation should not be identified to members of a chaplain promotion board by having each promotion candidate's three-digit "faith-group identifier" code prominently displayed throughout the promotion-board process. *See* Compl. at 37. "This procedure has no other purpose than to identify the candidate's faith group to the board and thereby create a suspect religious category unrelated to any legitimate Navy objective." *Id.* Despite the

defendants' argument that the plaintiffs have failed to state a constitutional claim on this issue, the court deems this argument persuasive. Although they perform religious functions, chaplains should be selected for promotions based on their fitness as officers and as chaplains, rather than the religious message of their sermons.

The plaintiffs also insist that the Fifth Amendment requires that all chaplains be given an equal and fair opportunity for promotion. *See* Pls.' Opp'n at 10. The court agrees that the Navy may not use religious prejudice to set quotas that are unrelated to a compelling governmental interest. *See Adarand*, 515 U.S. at 231-32; *Larson*, 456 U.S. at 242, 246. In support of their claim that the Navy disproportionately promotes liturgical Protestant chaplains to the upper ranks of the Chaplain Corps, the plaintiffs point to the Ellis Report, an internal 1995 memorandum from the Marine Corps Chaplain to the Navy's Chief of Chaplains. In the 15 years preceding the report, 119 incumbents held key billets in the Chaplain Corps, only 14 of which, or 11.8 percent, "have been clearly non-liturgical." *See* Compl., Ex. 4. In contrast, Roman Catholics filled 33.6 percent of the billets, while liturgical Christians filled 53.8 percent. *See id.* These statistics led Chaplain Ellis to make the following statements:

> the conclusions to be drawn are so clear as to make any such discrepancies inconsequential. There is no suggestion that this pattern was deliberate. However the institutional bias is very clear.
>
> ... the relative frequency of assignment of liturgicals to key decision making billets is disconcerting. ... Why is this important? First, it is an issue of justice. Secondly, the ability of the chief of chaplains to proclaim a vision that will be followed requires a sense of trust in the fairness of his administration of the affairs of the Corps.

> Thirdly, the Ecclesiastical Endorsers from the non-liturgical Churches, while not organized, are increasingly disenchanted with what they believe to be the unfair treatment of their chaplains. Fourthly, and perhaps most importantly, when only one perspective is reinforced to decision makers, and even those few non-liturgicals who are given key billets are there because they have been able to be non-confrontive [sic], the strength of diversity, which we tout to be so important, is unable to be realized. The thrust of the Chaplain Corps policies is thus skewed by incomplete perspective; perspective that perhaps could be supplied by the silent, in terms of position and influence, non-liturgicals.

Compl., Ex. 4.

The defendants articulate no compelling governmental objective for listing a promotion candidate's religious affiliation. The court therefore concludes that the plaintiffs have stated a Fifth Amendment equal-protection claim that identifying a candidate's religious affiliation to the chaplain promotion board violates strict scrutiny and thus denies the defendants' motion to dismiss this claim.[27]

---

[27] It is worth noting that although two of the plaintiffs' claims may seem to be inconsistent at first glance, they do indeed mesh together. On the one hand, the plaintiffs ask the court to order the Navy to bring its Chaplain Corps, including its current rank structure, "into line with the Navy's religious demographics." *See* Compl. at 59; Mot. to Dismiss at 8. Needless to say, to do this, the Navy would have to consider a chaplain's religious affiliation. At the same time, however, the plaintiffs ask the court to order the Navy not to consider a chaplain's denomination in considering which chaplains to promote. *See* Compl. at 37. The court views these two positions as entirely consistent. The plaintiffs seek a proportional-representation system because they believe this would help meet the free-exercise needs of DON personnel and would prevent an unconstitutional establishment of liturgical Christianity in the Chaplain Corps. At the same time, the plaintiffs can consistently argue that a

3. Implementing a Liturgical Protestant "General Service"

The plaintiffs allege that the Navy's policy of having only a "general Protestant" service and restricting other forms of non-liturgical religious services violates both the First Amendment's Establishment Clause and the Free Exercise Clause. *See* Compl. at 35. They claim that the defendants have tried to establish a de facto liturgical religion for its personnel, thereby limiting the opportunity for non-liturgical Navy personnel to meet their religious needs. *See id.* In addition, the non-liturgical Christian chaplains assert that by mandating a liturgical "general Protestant" service, the Navy has tried to shape all Protestant servicemen and women "into a single liturgical worship mold while ignoring or actively hindering the religious needs of non-liturgical personnel." *Id.* The Navy has allegedly done this by denying or restricting non-liturgical Christian chaplains' access to Navy facilities to conduct services, by removing non-liturgical chaplains from preaching or conducting religious services and by opposing non-liturgical Christian worship alternatives. *See id.*

Turning first to the plaintiffs' Free Exercise Clause claims, the court rules that the plaintiffs have standing only to challenge the Navy's policies and practices on behalf of the current and former non-liturgical Christian chaplain plaintiffs themselves (and possibly, a class of similarly situated current and former non-liturgical chaplains, if the court approves the anticipated motion for class certification). The defendants correctly point out that the plaintiffs do not have standing to bring a claim that the Navy has violated the rights of DON personnel to the free exercise of religion. *See* Mot. to Dismiss at 27 n.16. As the Supreme Court has held, "in the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U.S. 400, 410

---

chaplain's denomination should not factor into the decision as to whether she receives a promotion.

(1991). The court has allowed litigants to bring actions on behalf of third parties only when the litigant has met three important criteria: (1) the litigant must have suffered an "injury in fact"; (2) the litigant must have a close relation to the third party; and (3) "there must exist some hindrance to the third party's ability to protect his or her own interests." *See id.* at 410-11. Even assuming *arguendo* that the plaintiffs in this case could meet the first two criteria, they cannot meet the third since there is no reason why DON service members who feel that a general Protestant service violates their right to the free exercise of religion cannot bring their own lawsuit. Accordingly, to the extent that any of the plaintiffs' claims can be construed as a challenge brought by DON personnel, the court concludes that the plaintiffs lack standing to bring these claims on behalf of these third parties and grants the defendants' motion to dismiss these claims.

Conversely, the plaintiffs' claim that a general Protestant service violates the Establishment Clause survives the defendants' motion to dismiss. The defendants justify the alleged policy of having a general Protestant service by noting that because of the broad range of faiths of Navy personnel and the limited number of chaplains, the Chaplain Corps must structure its provision of worship services to fulfill the religious needs of as many DON personnel as possible. *See* Mot. to Dismiss at 25. Accordingly, the defendants note that "these resource constraints will often if not always make it impossible to hold a worship service at Naval facilities for each serviceperson's particular faith ...." *Id.*

The court is well aware that the Navy has limited resources and a limited number of chaplains to assign to its various installations across the globe. And the court understands the defendants' stated objective in adopting a utilitarian approach, whereby the Navy uses its limited chaplain resources to try to accommodate a religious fit for as many of its personnel as possible. The plaintiffs' concern, however, is that these allegedly general Protestant services

might too often reflect a liturgical Christian service, rather than offering a variety of services (and even if the Navy cannot offer a variety of services at one particular base, it might at least be able to do so at a worldwide level). This point carries significant weight in the court's view.

The plaintiffs charge that by offering a general Protestant service with a heavy dose of liturgical Christianity, the Navy has unconstitutionally communicated a message of endorsement for a specific religious tradition, in violation of the Establishment Clause. *See* Pls.' Opp'n at 33. The plaintiffs agree with the defendants' stated goal that the Navy must utilize its limited resources to provide opportunities "that are acceptable to a broader segment of adherents than merely one denomination," but they properly point out that the defendants nowhere "explain how mandating a worship service that appeals to a tradition representing only 8% of the Navy somehow appeals to the *broader segment* made up of non-liturgicals." Pls.' Opp'n at 34.

The defendants respond by once again arguing that courts should defer to the military's "professional judgment" in these matters. *See* Mot. to Dismiss at 27. But as the court made clear in Section III.B., the strict-scrutiny standard applies to this case and the question thus becomes whether the Navy's alleged policy of having a default general Protestant service with a liturgical Christian slant "is justified by a compelling governmental interest" and "is closely fitted to further that interest." *See Larson*, 456 U.S. at 246-47. The court rules that the plaintiffs have stated a claim that this alleged policy is not justified by a compelling governmental interest and, even if it were, is not closely fitted to further that interest. The court therefore denies the defendants' motion to dismiss this count.[28]

---

[28] On a separate point, the defendants contort the plaintiffs' claim into one that supposedly pleads that the non-liturgical Christian chaplains do not want to provide for the religious needs of DON personnel outside of

4. Free Exercise Claims and Religious Speech

There is considerable overlap between the plaintiffs' Establishment Clause claims, Equal Protection Clause claims, and Free Exercise Clause claims. The overriding theme that runs through all the claims relating to the plaintiffs' free exercise of their religion is that the Navy has adopted and implemented policies and practices that effectively silence non-liturgical Christian chaplains.

These claims include: identifying a chaplain-promotion candidate's religion to the chaplain promotion board; forcing non-liturgical churches off base into "substandard facilities which were inadequate to hold the number of those wanting to attend, while Catholic and liturgical Protestants enjoyed spacious on post facilities", Compl. at 36; senior Catholic and liturgical Protestant chaplains intentionally giving some non-liturgical Christian chaplains lower performance ratings than similarly situated Catholic and liturgical Protestant chaplains "solely on the basis of their religious identification and beliefs despite evidence of the non liturgical chaplains' superior performance", *see id.* at 46; requiring non-liturgical Christian chaplains to officiate at liturgical Protestant services, but not requiring liturgical Protestant chaplains to officiate at non-liturgical services, *see id.*; implementing a two-tiered system of discipline, whereby liturgical members receive lighter punishments for similar offenses than non-liturgical chaplains, *see id.* at 47; providing career-planning information to liturgical Christian chaplains but not to non-liturgical Christian chaplains, *see id.*; and limiting the ability of non-

---

their own particular faith. *See* Reply at 19-20. The defendants say that "subjecting Navy personnel to narrow services that promote one particular religious position when other services are not offered, could risk violating the Establishment Clause." Mot. to dismiss at 26. The defendants' argument is misleading. After all, the essence of the plaintiffs' allegation is that the Navy is violating the Establishment Clause by offering narrow services that promote one particular religious position when the Navy is not offering other services.

liturgical Christian chaplains to meet their community's religious needs since "non-liturgical chaplains must expend more effort to meet the needs of their faith group members than is required by liturgical Protestant chaplains." *Id.*

In all these allegations, the plaintiffs charge that because the Navy treats non-liturgical Christian chaplains less favorably, the defendants' policies and practices serve to impair or impede the plaintiffs' free exercise of religion. Because the plaintiffs have stated a claim that these policies and practices do not pass the strict-scrutiny test, these allegations survive the defendants' motion to dismiss.

Finally, the plaintiffs plead that the Navy's policies and practices amount to an unconstitutional abridgement of religious speech with a specific viewpoint, i.e., non-liturgical, evangelical, and low-church. *See* Compl. at 42. Specifically, the plaintiffs assert that senior officials in the Chaplain Corps have criticized and berated non-liturgical chaplains "for preaching and teaching on truths of the Christian faith and their specific religious tradition." *See id.* at 35. In another instance, a senior liturgical Christian chaplain allegedly disciplined a non-liturgical chaplain for ending his prayers by saying "in Jesus [sic] name." *See id.* at 6.

The defendants counter that any actions they have taken were done solely to try to maximize limited resources to provide for the ministry needs of the Navy. *See* Mot. to Dismiss at 3. In addition, the defendants rely heavily on a Seventh Circuit opinion, holding that a government-hospital chaplain "has no absolute constitutional right to conduct religious services and offer religious counsel in a government institution ...." *Baz v. Walters*, 782 F.2d 701, 708 (7th Cir. 1986). Without addressing what specific restrictions the Navy may impose on the speech of its chaplains, the court notes that the *Baz* case is largely inapplicable to the case at bar. In that case, the Seventh Circuit affirmed the district court's finding that Reverend Franklin Baz, formerly a chaplain of the United

States Veterans Administration ("VA") who worked at a hospital containing many psychiatric patients, had serious "difficulty in the discharge of his duties." *See id.* at 703. Among other things, Reverend Baz accepted honoraria for conducting funerals and borrowed money from patients to buy gasoline, both in violation of VA regulations, and, most significantly, continuously tried to proselytize his patients, also in violation of VA regulations. *See id.*

Citing the Supreme Court's declaration that when a government employee asserts that the government has infringed his constitutional rights, the court must strike a balance between the employee's interests as a citizen and "the interest of the [government] as an employer, in promoting the efficiency of the public services it performs through its employees," *see Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), the Seventh Circuit affirmed the district court's judgment for the defendants. *See Baz*, 782 F.2d at 709. The most notable difference between *Baz* and the case at bar is that in the latter, the defendants do not argue that the plaintiffs have, for example, violated any Navy regulations, committed any type of misconduct, or tried to proselytize or do anything else improper in conducting their worship services. While both *Baz* and *Pickering* can be read for the proposition that the government may place some time, place, and manner restrictions on the speech of government-employed chaplains, this court need not decide what the boundaries of those limitations should be in this case at this juncture.

The issue of what restrictions the Navy may place on the content of its chaplains' speech is a fascinating one, standing at the intersection of four major jurisprudential roads -- free speech, free exercise, establishment, and equal protection. One readily apparent point is that the Constitution prevents the Navy from regulating the religious speech of non-liturgical Christian chaplains but not that of liturgical Christian or Catholic chaplains. Such conduct would communicate a message that some religious speech is favored over others, a message that some chaplains are not allowed to

conduct their worship services as freely as others, a message that the Navy does not treat its chaplains of different faiths in an equitable matter and a message that the Navy endorses a specific religion. Since this is precisely what the plaintiffs allege that the Navy has done in this case, the plaintiffs have stated a claim that the Navy's alleged policies and practices in this regard do not survive strict scrutiny and would violate the plaintiffs' freedom of speech, right to the free exercise of their religion, right to equal protection, and the Establishment Clause.[29]

F. Individual Plaintiffs' Claim for Constructive Discharge

In their motion to dismiss, the defendants maintain that certain named plaintiffs fail to establish a prima-facie case of constructive discharge in the complaint. *See* Mot. to Dismiss at 33. To establish a claim for constructive discharge, the plaintiffs must not only show discrimination but also that the employer deliberately made work conditions intolerable, leading the employee to quit involuntarily. *See id.* at 33 (citing *Katradis v. Dav-el of Washington, D.C.*, 846 F.2d 1482, 1485 (D.C. Cir. 1988). The defendants note that the plaintiffs must allege both "discrimination and the existence of certain 'aggravating factors.'" *See id.* at 34 (quoting *Mungin v. Katten Muchin & Zavis*, 116 F.3d 1549, 1558 (D.C. Cir. 1997)).

While the defendants are correct on the substantive law, they are wrong on the civil procedure. As the D.C. Circuit

---

[29] The only other Establishment Clause claim set forth by the plaintiffs is that the defendants have violated Congress's tax and spending powers because Congress funds the Chaplain Corps, whose policies violate the Establishment Clause. *See* Compl. at 45. The court agrees with the defendants that "this count is not a separate constitutional claim, but is simply another way for plaintiffs to attempt to establish standing to raise [their] Establishment Clause challenges ...." Mot. to Dismiss at 27-28 n.17. Accordingly, the court grants the defendants' motion to dismiss this putative claim.

held in the very significant case, *Sparrow v. United Air Lines, Inc.*, a plaintiff need not set forth the elements of a prima facie case at the initial pleading stage. 216 F.3d 1111, 1113 (D.C. Cir. 2000). Accordingly, the plaintiffs at bar have no obligation to lay out a prima-facie case of constructive discharge in their complaint. The court therefore denies the defendants' motion on this point.

G. The Court Orders Additional Briefing on Several Claims

The court will order further briefing on several of the plaintiffs' claims that the parties' briefs do not sufficiently address. The defendants shall file a supplemental motion to dismiss, if they so choose, laying out their position on the following issues: the plaintiffs' claim of illegal retaliation, as set forth in Count 11; the plaintiffs' claim of a violation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000-bb *et seq.*; and the plaintiffs' claim concerning the Chief of Chaplains' role in the chaplain-promotion process, as discussed on pages 37-38 (¶¶ 46-49) of the amended complaint. The defendants do not address this last claim or the retaliation claim in their motion to dismiss or in their reply and only address the RFRA claim in a footnote. *See* Mot. to Dismiss at 20 n.13.[30]

H. Additional Motions

In addition to the defendants' motion to dismiss, the parties have filed other motions. Because the court has now resolved the defendants' motion to dismiss, the court denies as moot the defendants' motion to hold the proceedings in abeyance until the court resolves the motion to dismiss. As

---

[30] The defendants' motion addressing all these issues shall not exceed 10 pages, the plaintiffs' opposition shall not exceed 10 pages, and the defendants' reply shall not exceed seven pages. A time frame for filing these briefs is set forth in the attached order.

noted in the court's order dated September 28, 2001, the court denies without prejudice the plaintiffs' motion for partial summary judgment that was filed as part of the plaintiffs' opposition to the defendants' motion to dismiss. *See* Order dated September 28, 2001. The court agrees with the defendants that they should be entitled to have a full briefing period on the plaintiffs' motion. Accordingly, the schedule laid out in the court's September 28, 2001 order now controls briefing on both of the plaintiffs' motions for partial summary judgment. *See id.*

Lastly, the court denies without prejudice the plaintiffs' motion to allow a chaplain plaintiff to proceed with the litigation using a pseudonym. The plaintiffs have indicated that if any part of the complaint survives the motion to dismiss, they will file a motion for class certification, which would moot the need for the plaintiffs to pursue their motion to allow a plaintiff to use a pseudonym. Accordingly, if the court denies the anticipated motion for class certification, the court will grant the plaintiffs leave to refile their motion to allow a plaintiff to use a pseudonym.

IV. CONCLUSION

For all these reasons, the court denies in part and grants in part the defendants' motion to dismiss. In addition, the court denies as moot the defendants' motion to hold the proceedings in abeyance, denies without prejudice the plaintiffs' motion for partial summary judgment, and denies without prejudice the plaintiffs' motion to allow a chaplain plaintiff to use a pseudonym. An order directing the parties in a fashion consistent with this Memorandum Opinion is separately and contemporaneously issued this 10th day of January, 2002.

Ricardo M. Urbina
United States District Judge

10 U.S.C. § 618

Action on reports of selection boards

(a)(1) Upon receipt of the report of a selection board submitted to him under section 617(a) of this title, the Secretary of the military department concerned shall review the report to determine whether the board has acted contrary to law or regulation or to guidelines furnished the board under section 615(b) of this title. Following such review, unless the Secretary concerned makes a determination as described in paragraph (2), the Secretary shall submit the report as required by subsection (b) or (c), as appropriate.
(2) If, on the basis of a review of the report under paragraph (1), the Secretary of the military department concerned determines that the board acted contrary to law or regulation or to guidelines furnished the board under section 615(b) of this title, the Secretary shall return the report, together with a written explanation of the basis for such determination, to the board for further proceedings. Upon receipt of a report returned by the Secretary concerned under this paragraph, the selection board (or a subsequent selection board convened under section 611(a) of this title for the same grade and competitive category) shall conduct such proceedings as may be necessary in order to revise the report to be consistent with law, regulation, and such guidelines and shall resubmit the report, as revised, to the Secretary in accordance with section 617 of this title.

(b) (1) After completing the requirements of subsection (a), the Secretary concerned, in the case of the report of a selection board that considered officers who are serving, or have served, in joint duty assignments, shall submit the report to the Chairman of the Joint Chiefs of Staff.
(2) The Chairman, in accordance with guidelines furnished to the Chairman by the Secretary of Defense, shall review the report for the purpose of determining if--
(A) the selection board acted consistent with the guidelines of

the Secretary of Defense under section 615(c) of this title to ensure that selection boards give appropriate consideration to the performance in joint duty assignments of officers who are serving, or have served, in such assignments; and

(B) the selection board otherwise gave appropriate consideration to the performance in joint duty assignments of officers who are serving, or have served, in such assignments.

(3) After reviewing the report, the Chairman shall return the report, with his determinations and comments, to the Secretary concerned.

(4) If the Chairman determines that the board acted contrary to the guidelines of the Secretary of Defense under section 615(c) of this title or otherwise failed to give appropriate consideration to the performance of officers in joint duty assignments, the Secretary concerned may--

(A) return the report, together with the Chairman's determinations and comments, to the selection board (or a subsequent selection board convened under section 611(a) of this title for the same grade and competitive category) for further proceedings in accordance with subsection (a);

(B) convene a special selection board in the manner provided for under section 628 of this title; or

(C) take other appropriate action to satisfy the concerns of the Chairman.

(5) If, after completion of all actions taken under paragraph (4), the Secretary concerned and the Chairman remain in disagreement with respect to the report of a selection board, the Secretary concerned shall indicate such disagreement, and the reasons for such disagreement, as part of his transmittal of the report of the selection board to the Secretary of Defense under subsection (c). Such transmittal shall include any comments submitted by the Chairman.

(c) (1) After his final review of the report of a selection board, the Secretary concerned shall submit the report, with his recommendations thereon, to the Secretary of Defense for transmittal to the President for his approval or disapproval. The Secretary of Defense shall, before transmitting the report

of a selection board to the President, take appropriate action to resolve any disagreement between the Secretary concerned and the Chairman transmitted to him under subsection (b)(5). If the authority of the President under this paragraph to approve or disapprove the report of a selection board is delegated to the Secretary of Defense, it may not be redelegated except to an official in the Office of the Secretary of Defense.
(2) If the report of a selection board names an officer as having a record which indicates that the officer should be required to show cause for his retention on active duty, the Secretary concerned may provide for the review of the record of that officer as provided for under regulations prescribed under section 1181 of this title.

(d) The name of an officer recommended for promotion by a selection board may be removed from the report of the selection board only by the President.

(e)(1) The names of the officers recommended for promotion in the report of a selection board shall be disseminated to the armed force concerned as follows:
(A) In the case of officers recommended for promotion to a grade below brigadier general or rear admiral (lower half), such names may be disseminated upon, or at any time after, the transmittal of the report to the President.
(B) In the case of officers recommended for promotion to a grade above colonel or, in the case of the Navy, captain, such names may be disseminated upon, or at any time after, the approval of the report by the President.
(C) In the case of officers whose names have not been sooner disseminated, such names shall be promptly disseminated upon confirmation by the Senate.
(2) A list of names of officers disseminated under paragraph (1) may not include--
(A) any name removed by the President from the report of the selection board containing that name, if dissemination is under the authority of subparagraph (B) of such paragraph; or

(B) the name of any officer whose promotion the Senate failed to confirm, if dissemination is under the authority of subparagraph (C) of such paragraph.

(f) Except as authorized or required by this section, proceedings of a selection board convened under section 611(a) of this title may not be disclosed to any person not a member of the board.

(g) If the Secretary of a military department or the Secretary of Defense makes a recommendation under this section that the name of an officer be removed from a report of a selection board and the recommendation is accompanied by information that was not presented to that selection board, that information shall be made available to that officer. The officer shall then be afforded a reasonable opportunity to submit comments on that information to the officials making the recommendation and the officials reviewing the recommendation. If an eligible officer cannot be given access to such information because of its classification status, the officer shall, to the maximum extent practicable, be provided with an appropriate summary of the information.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAPLAINCY OF FULL GOSPEL CHURCHES,	)	
v.	)	Case No. 1: 99CV02945 (RMU)
THE HON. GORDON R. ENGLAND, et al.	)	**Consolidated with**
ROBERT H. ADAIR, et al.,	)	
v.	)	Case No. 1: 00CV00566 (RMU)
THE HON. GORDON R. ENGLAND, et al.	)	

DECLARATION OF GARY PAUL STEWART

Pursuant to 28 U.S.C. § 1746, I, Gary Paul Stewart, declare as follows:

1. I live at 303 Pommel Court, Jacksonville, North Carolina. I am a chaplain at the grade of Lieutenant Commander currently assigned to Camp Lejeune, NC. I am competent to testify on and have personal knowledge of the matters addressed or discussed in this declaration.
2. I was a recorder on a Lieutenant Commander Chaplain Promotion Board in June 1991.
3. I have relevant and material information bearing on the questions of improper criteria being used in the selection process, including faith group preference or criteria because of my position as a recorder.
4. I took an oath that I would not discuss the proceedings of the board on which I served.

5. I am willing to testify concerning what I saw, heard and experienced once the burden of the oath is removed.

I make this declaration under the penalty of perjury, it is true and accurate to the best of my ability, and it represents the testimony I would give if called upon to testify in a court of law.

Dated: October , 2002 /S/

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAPLAINCY OF FULL GOSPEL CHURCHES,	)	
v.	)	Case Number 1: 99CV002945 (RMU)
HON. GORDON R. ENGLAND, et al.	)	**Consolidated with**
ROBERT H. ADAIR, et al.,	)	
v.	)	Case Number 1: 00CV00566 (RMU)
HON. GORDON R. ENGLAND, et al.	)	

DECLARATION OF KLON K. KITCHEN JR.

Pursuant to 28 U.S.C. § 1746, I, KLON K. KITCHEN JR. declare as follows:

1. I live at 107 Falcon Dr., Richmond Hill, GA 31324. I am competent to testify on and have personal knowledge of the matters addressed or discussed in this Declaration.
2. I am an Army chaplain at the grade of Captain, currently assigned to Fort Stewart, GA. I have recently been selected for promotion to the rank of Major (O-4).
3. Prior to becoming an Army chaplain, I was a Navy chaplain until I was separated after being twice not selected for promotion to Lieutenant Commander (LCDR). I am a plaintiff in the Chaplaincy of Full Gospel Churches lawsuit and this declaration addresses an incident that occurred during my time as a Navy chaplain.
4. Around May of 1996, I was assigned to Marine Air Group (MAG) 31 at Beaufort, S.C.

5. I was present at a luncheon with Chaplain (Captain) Wayne Bumbry from the 2D Marine Air Wing and Chaplain (Commander) Norman Brown, the MAG 31 senior chaplain, and Chaplain (LCDR) Dave Gibson, also of MAG 31.

6. During this luncheon, Chaplain Bumbry said that he had recently sat on a Chaplain Captain selection board and that at the end of the board they realized that they had not selected any Catholics for Captain. He told us that the board members had to reconvene in order to pick a Catholic and deselected a Protestant to do so, i.e., took someone off the list that had already been selected.

7. I remember this distinctly because having been twice passed over (not selected) to Lieutenant Commander I was on my way out of the Navy, this was my last month on active duty, and I was upset that a promotion board would deselect someone merely to make sure they had a Catholic selectee.

I make this declaration under the penalty of perjury, it is true and accurate to the best of my ability, and it represents the testimony I would give if called upon to testify in a court of law.

Dated: January 16, 2002

/S/
KLON K. KITCHEN, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHAPLAINCY OF FULL GOSPEL CHURCHES,	)	
v.	)	Case Number 1: 99CV002945 (RMU)
THE HON. GORDON R. ENGLAND, et al.	)	

Affidavit of Floyd Cedric Ellison

1. My name is Floyd Cedric Ellison. I was born march 28, 1937 and reside at 535 "J" Street, Chula Vista, California, 91910. I have personal knowledge of and am competent to testify concerning the information presented in this affidavit.

2. I completed my undergraduate education at Augustana College in Rock Island, Illinois in June, 1959. My Master of Divinity in May of 1963, the Master of Religious Education, June 1971, and the Doctor of Ministry in June of 1981 were degrees each completed with the American Baptist Seminary of the West located in Berkeley, California.

3. After I was endorsed by the American Baptist Churches, I was commissioned as a chaplain on March 22, 1972, and entered active duty in the Navy on February 1, 1974.

4. I was selected for early retirement by the Selective Early Retirement Board (SERB) for FY 1997, and I was separated (retired) from the Navy on August 1, 1997.

5. During June of 1996 I turned over the position of Command (Senior) Chaplain, Naval Construction Battalion Center, Port Hueneme, California to the new incoming Command Chaplain, Captain Jim Anderson. Chaplain

Anderson had just that previous February 1996, sat on the Chaplain Corps Captain selection board as one of its five Board members. He was the only Catholic Chaplain on the board. Traditionally there was always a minimum of one priest on each board.

6. During Chaplain Anderson's and my turnover process, Chaplain Anderson described an event which he said occurred during the FY 97 Captain Selection Board proceedings conducted earlier that February of 1996. He said that after the initial votes were cast, not one Catholic chaplain had been selected for Captain. He mentioned his concern to the board, and a woman officer on the board told him, "Well I am Catholic, and I know several of these Catholic chaplains; they are certainly not Captain material!" According to Chaplain Anderson, the following day, he again brought up the issue, and said that there would be a hue-and-cry from the Catholic Military archdiocese, and they would never hear the end of it, if at least one Catholic were not selected. Chaplain Anderson, a Columban Order priest, then brought out the record of fellow Franciscan Order priest, Louis Iasiello, whom the board then voted on, and in fact selected two years junior to the other selectees. Chaplain Anderson did not mention any other faith groups threatening retribution if their candidates were not selected during the board's proceedings.

7. I turned over the position to Chaplain Anderson, and reported to Guam where the following year I was selected for early retirement, effective August 1, 1997.

Under penalty of perjury, I affirm that the above information is true and correct to the best of my ability and reflects the testimony I would give if called to testify in a court of law.

/s/
Floyd Cedric Ellison
Captain, Chaplain Corps

U.S. Navy (retired)

Subscribed and sworn to before me this 31st day of January, 2000.

/s/
Haydee La Bounty
Notary Public
My Commission expires: 11-1-2003

DECLARATION OF GARY PAUL STEWART

Pursuant to 28 U.S.C. § 1746, I, Gary Paul Stewart, declare as follows:

1. I live at 10803 Tides Court, Fredericksburg, Virginia. I am a chaplain at the grade of Lieutenant Commander currently assigned to Marine Corps Base Quantico, VA. I am competent to testify on and have personal knowledge of the matters addressed or discussed in this declaration.

2. I was a recorder on the Fiscal Year 91 Chaplain Staff Corps Lieutenant Commander Promotion Board (the "Board").

3. As a recorder, I was responsible for making sure all the chaplain records appearing before the Board were complete and in order. This can only be accomplished by reviewing the records to make sure that all the appropriate information is current and complete, e.g., photos, awards, and reports, and no improper material is in a chaplain's file.

4. In doing this, I reviewed all the records of those appearing before the Board. I was in a position to have seen the quality of the fitness reports and records of those considered by the Board, both those selected and not selected.

5. I can state without equivocation, and without revealing the "proceedings" of the Board, that the record of one Catholic selected for promotion to Lieutenant Commander was grossly inferior to other chaplains who were passed over for promotion, including at least one non-liturgical chaplain who is a named plaintiff. In addition, the chaplain selected with the far inferior record was grossly overweight, a fact well known throughout the Chaplain Corps.

6. It was made known to me after the Board concluded that this chaplain had been charged with multiple counts of pedophilia while previously stationed in Sigonella, Italy, a fact that was not recorded in his records at the time the

Board considered and promoted him to the rank of Lieutenant Commander.

7. I witnessed the discussion about and selection of this chaplain.

8. I am requesting that the Court, as a higher authority, direct the Secretary of the Navy to relieve me of my oath so that I can testify publicly to what I witnessed and heard. I believe it is highly relevant to the issue of misconduct on promotion boards and unconstitutional preferences within the United States Navy and the evidence I will reveal is not available from other, non restricted sources.

9. I am in no way being compelled to testify on this matter, but desire to testify of my own accord, to preserve a clear conscience, and to protect the Navy and those that serve it from discrimination and prejudice.

***

I make this declaration under the penalty of perjury, it is true and accurate to the best of my ability, and it represents a portion of the testimony I would give if called upon to testify in a court of law. It is here limited due to the oath of secrecy enforced upon me by the Secretary of the Navy.

Dated: 13 August 2004

/S/
GARY PAUL STEWART

RESOLUTION: JUNE 13, 2001, NEW ORLEANS

RESOLUTION NO. 7
ON DISCRIMINATION AGAINST MILITARY CHAPLAINS

WHEREAS, Personnel from Southern Baptist churches serve this nation and defend its freedoms with dignity and honor in the united States military; and

WHEREAS, Ministers of the Gospel endorsed by the Southern Baptist Convention Chaplaincy Team of the North American Mission Board serve with dignity and distinction in the united States military; and

WHEREAS, the First Amendment of the united States declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, ..." thereby guaranteeing both the freedom of speech and the free exercise of religions; and

WHEREAS, a biblical mandate and constitutional right of Southern Baptist chaplains is to preach and teach the whole counsel of God according to the dictates of their biblical and denominational beliefs (Acts 4: 18-20), and

WHEREAS, Legal claims pending in the federal courts, as well [as] reports in the national press, allege that [the] Navy has acted with prejudice toward Southern Baptist naval personnel and their chaplains and denied them fair and equitable treatment because of their evangelical belief and practices; and

WHEREAS, The Navy allegedly has allowed and encouraged an anti-evangelical, hostile culture resulting in active repression of Southern Baptist and other evangelical naval personnel; and

WHEREAS, Evangelical chaplains allege that the leadership of the United States Chaplains Corps has levied unequal treatment against them, including the illegal denial o promotion and retention based on religious bias; and

WHEREAS, Evangelical chaplain allege in federal court that when they preached the Gospel, chapel services grew numerically, and that these services were often shut down or changed to liturgical formats, after which the number of attendees dramatically decreased; and

WHEREAS, The net effect of these alleged practices of discrimination is restricted biblical ministry to Southern Baptists and other military personnel and their families; and

WHEREAS, Limited facilities coupled with language and cultural differences in foreign duty locations make it imperative that the military provide meaningful opportunities for Southern Baptists and other evangelical Christians to worship freely; now, therefore, be it

RESOLVED, That the messengers to the Southern Baptist Convention meeting in New Orleans, Louisiana, June 12-13, 2001, renounce any unconstitutional treatment of Southern Baptist chaplains and all military men and women; and be it further

RESOLVED, That we further urge the United States Navy to rectify past documented injustices, and that we further urge that policies and procedures be implemented to insure the free religious practice for all military personnel, without discrimination; and be it further

RESOLVED, That we affirm all Southern Baptist and other evangelical chaplains and military personnel serving in the armed forces, and be it

RESOLVED, That we prayerfully encourage military

chaplains to continue to be "strong in the Lord and in the power of His might (Ephesians 6:10)"; and be if finally

RESOLVED, That we genuinely commend their preaching and teaching "the whole counsel of God" (Acts 20:27) and fully support the commitment to the Gospel of Jesus Christ without fear of retaliation.

RESOLUTION REGARDING ALLEGED RELIGIOUS DISCRIMINATION AGAINST MILITARY CHAPLAINS SERVING IN THE U.S. NAVY: 8 AUGUST 2001, Greencastle, Ohio

WHEREAS, The Associated Gospel Churches (AGC) represents a constituency of over 4.2 million Americans, many of whom serve in the U.S. Armed Forces both at home and abroad; and

WHEREAS, the AGC for over 60 years has provided the highest quality Military Chaplains who have faithfully and honorable served in all branches of the U.S. Armed Forces and have guarded the constitutional right of free exercise of religion for those who serve in the U.S. Military; and

WHEREAS, AGC military personnel and chaplains are bound by loyalty to God, to His Word, and to the faithful proclamation of the whole counsel of God to the world as mandated by Holy Scriptures; and

WHEREAS, It has been reported in the national media and formally charged in federal courts that the U.S. Navy Chaplain Corps has clearly demonstrated a consistent religious bias against those termed "non-liturgical," who generally are evangelical and conservative in faith, which terms embrace chaplains of the Associated Gospel Churches; and

WHEREAS, Deliberate religious discrimination is contrary to fundamental fairness, violates the principles of the U.S. Constitution, and is harmful to the spiritual health of the Navy families being served by the Navy Chaplaincy; and

WHEREAS, In the sixty-three-year history of the AGC only three AGC Navy Chaplains have been promoted to the rank of Commander and only one to the rank of Captain while non have ever been assigned to a key career-enhancing or

leadership position in the Corps; and

WHEREAS, The cumulative effect of such alleged bias of the Navy Chaplain Corps against evangelical chaplains in general and AGC Chaplains in particular would result in the unlawful restriction of the constitutional rights of AGC members and their families; now therefore, be it

RESOLVED, That we, the members of AGC duly assembled, protest any and all such unconstitutional infringement of the religious liberties of our constituency and other evangelicals as has been alleged against the U.S. Navy Chaplain Corps; and be it further

RESOLVED, That we urge the Secretary of the Navy and the Secretary of Defense to fully investigate this alleged Navy Chaplain Corps bias, rectify any past injustices, and implement such policy and procedures to insure for all an environment free of religious bias and without fear of retaliation; and finally, be it

RESOLVED, That we lift up our Military Chaplains in prayer and beseech them to continue to remain faithful and to "preach the Word" regardless of the consequences.

GLOSSARY

A. **Faith Group Categories**. The Navy divides its chaplains and personnel into four general religious categories according to faith group similarities: Catholic, Protestant liturgical, non-liturgical and Special Worship. A 7/31/87 Chief of Chaplains' Memorandum for the Asst. Secy. of the Navy, Subj: Chaplain Corps Faith Group Imbalance, explains how the Chaplain Corps uses faith group clusters in its management. The second and third category terms are significant to this Petition and its issues.

1. "Protestant liturgical" collectively describes those Christian denominations which trace their origins to the Protestant Reformation, *e.g.*, Lutheran and Reformed, "emphasize a sacramental theology including infant baptism, worship under officially adopted forms, wear vestments and "follow a cycle of lectionary readings [a list of scripture readings to be read in church services at specific times throughout the year]." *Id.* at 2. "Protestant liturgical" means chaplains of the various Lutheran, Reformed, Episcopal, Methodist, Methodist Episcopal, Presbyterian, Congregational and Orthodox faith groups.

2. "Non-liturgical Christian" refers to those Christian denominations or faith groups without a formal liturgy or order in their worship service. In general, they "emphasize a Word-centered theology", baptize only adults or children who have reached the age of reason, and their clergy "do not wear vestments and do not follow a cycle of lectionary readings" during services. *Id.* Some Navy chaplains refer to these faith groups as "evangelicals". Baptist, Evangelical, Pentecostal, Bible and Charismatic churches are examples of non-liturgical Christian ("Non-liturgical") faith groups.

3. "Special Worship" category includes a group of faith groups, both Christian and non-Christian, whose ministry needs are distinctly different from Catholic and other Christian faith groups. Jewish, Christian Science, Seventh Day Adventist, Latter Day Saints (Mormons), Buddhist, Hindu, Moslem, Jehovah's Witnesses and Unitarian are in this category.

3. "Liturgical" or "liturgical tradition" refers to both Catholic and Protestant Liturgical faith groups.

B. **Precept** - the Secretary of the Navy's official guidance to a selection board.

C. This Petition uses the following abbreviations:
Commander - CDR
Lieutenant Commander - LCDR
Lieutenant - LT
Rear Admiral - RADM
Fiscal Year - FY
Department of Defense - DOD
Naval Inspector General - NIG